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Table of Contents

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38

POOLS, COMBINATIONS, CONSPIRACIES AND JOINT VENTURES

by

JOSEPH TAUBMAN*

Has American antitrust law really developed its categories, by which it classifies liability under the Sherman Act, or has it retrogressed to the point where its categories are so imprecise that the antitrust lawyer becomes a purveyor of impressionism? Admittedly, the common law has been expert at rounding the edges of doctrine with a remarkable plasticity, thereby meeting new situations justly and preventing novel use of old labels unjustly.

Nevertheless, changing circumstances and opinions may so modify our conceptions as to leave them with little relationship to their origin, logic or current events. Our categories then become blurred and indistinct. In time, they may even cease to be rational, for, "Rational thought is thought in terms of the entire conceptual system and the core of the system is constituted by categories." [1]

In this connection, we propose to examine four notions, pools, combinations, conspiracies, and joint ventures in the course of development of Sections 1 and 2 of the Sherman Act. To the extent possible, we shall also regard these notions from the viewpoint of federal income tax classification. It is hoped thereby to add a comparative dimension to our analysis.

I. THE COMBINATION MOVEMENT

(a) *The Early Pools*

Like the Book of Genesis, the context for enactment of the Sherman Act was a much less complex society than today's. In the decades following the Civil War, the pool was the commonest mode of restricting competition among manufacturers.[2] In this period, when American industry was gathering strength, the pool was a method of cooperation which enabled its members to do a multitude of things, including regulation of prices and production. Its guiding

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[1] Taylor, *Conceptions of Institutions and the Theory of Knowledge* 106 (1956).

[2] Jones, *The Trust Problem in the United States* 6 (1929).

philosophy was "to meddle as little as possible with details of management in the constituent companies." [3] However, this virtue was also its weakness. Such preservation of independence meant that the pool was a form of voluntary association, and that freedom of assent imported freedom of dissent and withdrawal on short notice.[4]

Economically, pools had a *pro tem* quality. They were short term, either by design or by operation of market forces. The pool was a form of association which might delegate authority to act in a representative capacity.[5] However, in most instances, it was not the type of association which has been classified as a corporation in federal income taxation.[6] The pool was generally formed by *delectus personae,* i.e., by personal choice of associates. On the other hand, an association taxable as a corporation is so classified, not only because it has representative capacity, but also because it has free transferability of associates, regardless of death of a member.[7] Since the purpose of the pool was to secure the advantages of cooperation for the members who were known to each other, it was not characterized by impersonal association. Membership could not be acquired merely by acquisition of a certificate of equity ownership nor by substitution of one member for another without the consent of the associates. For this reason, pools were classified as partnerships by Congress for federal income tax purposes in 1932 and continued in the same form in the 1939 and 1954 Codes.[8]

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[3] Montague, *Trusts of Today* 8 (1904).

[4] Meade, *Trust Finances* 27 (1903); Jones, *op. cit., supra,* note 2.

[5] Meade, *ibid.*, p. 26. "The pool is usually organized with central governing or advisory body which conducts all routine business and receives and distributes the funds of the organization."

[6] Taubman, *The Joint Venture and Tax Classification,* Chapter VI, Joint Venture and Corporate Tax Classification (1957).

[7] *Morrissey* v. *Comm'r,* 296 U. S. 344 (1935). Treasury Regulations 111, Sec. 29.3797-4. "If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation."

[8] Revenue Act of 1932, Sec. 1111(a)(3), Int. Rev. Code (1939), Sec. 3797(a)(2) and Int. Rev. Code, Sec. 7701(a)(2). The Statute reads in part, "The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation."

Being voluntary and often short-term, the pool lent itself to jockeying for position among its members. Production quotas might be exceeded or prices reduced by a member despite agreement to the contrary.[9] The common law added to the inherent defects of policing such a pool by providing that pooling agreements were unenforceable.[10]

Moreover, pools were catch-all in nature. Jones classifies six types of pools: (1) gentleman's agreement, (2) speculation pool, (3) output pool, (4) division of field pool, (5) selling agency, and (6) patent pool.[11] However, such classification is more congenial to the realist school of jurisprudence than to one based upon forms of business organization. Like the joint venture, it was seldom denominated as such by name and the term was rarely used within the written instrument to describe its operations.[12] For pools assumed a variety of forms. Some were in the form of associations.[13] Others were organized by agreement,[14] often in secret.[15] An example of

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[9] Meade, *op. cit., supra,* note 5, p. 27 refers to the temptation to reduce prices during a depression among pool members despite agreement to maintain prices.

[10] *Emery* v. *Ohio Candle Co.,* 47 Ch. St. 320, 24 N. E. 660 (1890). Wyman, *Control of the Market* (1911). "It is to be noted again that when a combination in restraint of trade is once proved to be such, outlawry is declared. It can bring no suit against those in it; neither can they sue it.", at page 148. Jones, *op. cit., supra,* note 2, at page 17.

[11] Jones, *op. cit., supra,* note 2, cf., Haney, *Business Organization and Combination,* 163 (3rd Ed. 1934), who sets forth the following categories: (a) output or traffic pools, (b) territory or market pools, (c) income pools, and (d) sales association pools.

[12] One could play the game of "look for the pool" among the following, which are commonly regarded as anti-trust pool cases: *Addyston Pipe and Steel Co.* v. *U. S.,* 175 U. S. 211 (1899), no reference to pool; *U. S. Consolidated Seed & Raisin Co.* v. *Griffin & Skelley Co.,* 126 Fed. 64 (C. A. 9th, 1903), no reference to pool; *Lee Line Steamers* v. *Memphis, Helena & Rosedale Packet Co.,* 277 Fed. 5 (C. A. 6th, 1922), mere reference to pooling receipts; *Butchart* v. *U. S.,* 295 Fed. 577 (C. A. 9th, 1924), no reference to pool; *U. S.* v. *New Wrinkle, Inc.,* 342 U. S. 371 (1952), mere reference to pooling patents; Cf., *U. S.* v. *Paramount,* 63 F. Supp. 323, 350 (S. D. N. Y. 1946); affirmed, 334 U. S. 131, 149 (1948); on remand, 85 F. Supp. 881, 892 (S. D. N. Y., 1949), where pools and joint interests are discussed at length.

[13] For example, the associations formed in *U. S.* v. *Trans-Missouri Freight Association,* 166 U. S. 290 (1897); *U. S.* v. *Joint Traffic Association,* 171 U. S. 505 (1898).

[14] For forms of pool by agreement as well as by articles of association, see, Stevens, *Industrial Combinations and Trusts,* pp. 1 *et seq.* and pp. 185 *et seq.* (1914).

[15] Meade, *op. cit., supra,* note 5, at page 32. Often ". . . the pool was a secret agreement whose details were not a matter of record and against which it was difficult to secure evidence."

the latter would be the gentleman's agreement which required no papers and no organization.[16]

Combination by pool, then, had drawbacks both for business as well as legal reasons. The bar solved this problem by resorting to a method of combination which was firmer in business as well as in law.

(b) *The Trust Combinations*

The trust was permanent and provided centralized organization.[17] This device was intended to give legal force to combinations illegal as pools.[18] By 1882, the Standard Oil Trust had been formed; by 1884, the Cotton Oil Trust; by 1885, the Linseed Oil Trust; by 1887, the Sugar and Whiskey Trusts and many others.[19] The trustees held the stock of the constituent companies of the trust combination and voted them and acted on behalf of the combination as trustees.

This form of industrial combination presently became the target of state legislation and litigation. By 1890, a number of states had enacted antitrust laws or constitutional provisions in one form or another.[20] The State of Ohio resorted to legal proceedings against the Standard Oil Trust and its courts declared it illegal in 1892.[21] New York brought proceedings against the Sugar Trust and its courts held the trust combination was illegal, among other reasons, because power was vested in the board of directors of each corporation and corporations could not combine as partners.[22]

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16 Jones, *op. cit., supra,* note 2.

17 Meade, *op. cit., supra,* note 5, page 32. Unlike the pool, which might be concealed, the trust generally was not.

18 Montague, *op. cit., supra,* note 3, at page 30.

19 Letwin, *Congress and the Sherman Act: 1887-1890,* 23 U. Chi. L. Rev. 221, 233 (1956). Letwin also enumerates Envelope, Salt, Cordage, Oil-Cloth, Paving-Pitch, School-Slate, Chicago Gas, St. Louis Gas, New York Meat, and Paper Bag Trusts.

20 Davies, *Trust Laws and Unfair Competition* (1915) Sec. 4, page 9.

21 *State* v. *Standard Oil Co.*, 49 Oh. St. 137, 30 N. E. 279, 15 L. R. A. 145 (1892).

22 *People* v. *North River Refining Co.,* 121 N. Y. 582, 24 N. E. 834 (1890). New York adheres to this view that corporations may not be partners to this day. See, Op. Att'y Gen. 230 (1935); but corporations may enter into a joint venture, *Red Robin Stores* v. *Rose,* 274 App. Div. 462, 84 N. Y. S. 2d 685 (1st Dept. 1948); for other jurisdictions, see, Rowley, *The Corporate Partner,* 14 Minn. L. Rev. 769 (1930); The Corporation as Party to a Joint Venture, 80 A. L. R. 1049; Note—

This form of industrial combination differed from the Massachusetts or business trust[23] in that, in the former, the trust *res* was the stock of the combined companies, whereas, in the latter, it was the underlying assets of a particular enterprise, in trust, rather than in corporate form. The business trust, in the main, was not a combination trust and did not suffer interdiction under state or federal antitrust laws. It was variously treated as pure trust, corporation or partnership under local law.[24] In 1924, the Supreme Court held the business trust to be an association taxable as a corporation.[25] In 1935, Chief Justice Hughes set forth the features common to business trusts and corporations—holding of title by the entity, centralized control, continuity uninterrupted by death of an associate, transferability of shares or interests and limited liability.[26] *A fortiori,* then, a trust combination would be taxable as a corporation since it would be a business trust, albeit its *res* would be stocks of constituent companies, with a business purpose and with a greater resemblance to a corporation than a partnership.[27]

Perhaps this explains why some writers consider the combination trust as a step in the economic evolution of industrial society to a culmination in a single compound corporation.[28] This does not follow. As tax law and, indeed, antitrust law have shown, there is no mechanical evolution of business organization. Lawyers will advise adoption of whatever form is most advantageous to their clients at that time.

Corporations—Power of Corporations to Become Member of Partnership, 25 Tulane L. Rev. 272 (1935).

[23] Annotation, Massachusetts or Business Trusts, 156 A. L. R. 22; Sears, *Trust Estates as Business Companies* (2d Ed. 1921); Wrightington, *The Law of Unincorporated Associations and Business Trusts* (2d Ed. 1923); Warren, *Corporate Advantages Without Incorporation* (1929).

[24] *Williams* v. *Milton,* 215 Mass. 1, 102 N. E. 355 (1913) (pure trust), cf., *Frost* v. *Thompson,* 219 Mass. 360, 106 N. E. 1009 (1914) (Partnership); *City Bank Farmers Trust Co.* v. *Graves,* 272 N. Y. 1, 3 N. E. 2d 612 (1936) (corporation); *Thompson* v. *Schmitt,* 115 Tex. 53, 274 S. W. 554 (1925) (partnership).

[25] *Hecht* v. *Malley,* 265 U. S. 144 (1924).

[26] *Morrissey* v. *Comm'r,* 296 U. S. 344, 359 (1935).

[27] Business powers set forth in the trust instrument are controlling as to business purpose, *Helvering* v. *Coleman-Gilbert Associates,* 296 U. S. 369 (1935).

[28] Wyman, *op. cit., supra,* note 10, at page 163; Haney, *op. cit., supra,* note 11, at pages 140-141; Industrial Combinations, 3 Encyclopaedia of the Social Sciences 664, 666 (1949).

Therefore, because combinations by way of trust were in vogue at the time the first bills were debated in Congress, they were designated on their face as bills to define or declare unlawful trusts and combinations in restraint of trade.[29] One form of bill attempted to define a trust as ". . . the combination of capital or skill by two or more persons . . ." for various purposes, such as fixing prices, or production, preventing competition or creating monopoly.[30]

(c) *The Sherman Act*

Papandreau and Wheeler aver that the Sherman Act ". . . was not the result of careful investigation."[31] The debates in Congress seem to support this contention with respect to the meaning of the term, combination. Perhaps we must be satisfied with the statement of Senator Sherman that ". . . it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries."[32]

At common law, combinations in restraint of trade were not easy to classify[33] and the basis for establishing illegality of a combination was obscure.[34] There was also doubt as to whether there was a common law of the United States, but Congress was cognizant of ". . . the enormous development of corporate organization, the facility for combination which such organizations afforded, and that combinations known as trusts were being multiplied . . ."[35] At

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[29] Bills and Debates in Congress Relating to Trusts (1903), Government Printing Office, Fiftieth Congress to Fifty-seventh Congress, First Session, inclusive.

[30] *Id.* at page 7, S. 3440, introduced by Senator Reagan into the 50th Congress on August 14, 1888.

[31] Papandreau and Wheeler, *Competition and Its Regulation* 213 (1954).

[32] Note 29, *supra*, at page 101, taken from Congressional Record, Volume 21, Senate, March 21, 1890, at page 2460.

[33] Allen, 23 Harv. L. Rev. 531 (1910), sets forth at pp. 546-7 four classes of combination in restraint of trade at common law. The first is English statutes in force in the United States. This would hardly be an applicable category. The fourth is based on dicta rather than a square holding.

[34] Letwin, *op. cit., supra*, note 19, at page 243.

[35] *Standard Oil* v. *U. S.*, 221 U. S. 1, 49-51 (1911), per opinion of Chief Justice White.

any rate, it was politic and propitious to pass an antitrust measure at the time.[36]

As enacted, Section 1 of the Sherman Act declared every contract, combination, by trust or otherwise, or conspiracy in restraint of trade unlawful. Section 2 proscribed any combining or conspiring to monopolize, as well as monopolizing or attempting to monopolize.[37]

Examination of the numerous antitrust bills before Congress at the time indicates that the Legislature probably adopted the bill with the best draftsmanship.[38] This may have impelled Chief Justice Hughes to state, "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." [39]

The Sherman Act was legislative recognition by the federal government that monopolies could arise in the business community independent of and without the grant of monopoly privileges by the state. For Congress had recognized from its inception that the state could create monopolies since the Constitution, and, prior thereto, English law had created sanction for this in copyright and patents.[40] Indeed, from ancient Rome on, the sovereign had been zealous to protect itself against the possible encroachments of corporate power.[41] In the Nineteenth Century, Gierke's organic theory postulated that groups could be corporate apart from any grant or concession by the State.[42] The Sherman Act manifested an appreciation by Congress that it must establish laws for the limits of power of non-state bodies. In so doing, it also included language to check a potentially even more sinister form of organization, the conspiracy.

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[36] Papandreau and Wheeler, *op. cit., supra,* note 31, at page 213. The Sherman Act was passed almost unanimously as an appeasement measure. The Republicans feared that the West might be lost to the Democrats or an anti-monopoly third party; the Democrats were equally concerned over a third party.

[37] Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890).

[38] Bills and Debates in Congress Relating to Trusts, *op. cit., supra,* note 29.

[39] *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 359-60 (1933).

[40] See, Ely, *Monopoly and Trusts* (1910), Chapter I, The Idea of Monopoly, pp. 1-38; and Chapter II, The Classification and Causes of Monopoly, pp. 39-95.

[41] Burdick, *The Principles of Roman Law and Their Relation to Modern Law* 286 (1938).

[42] Maitland's Gierke, *Political Theories of the Middle Ages* (1900). Translation and Introduction by Maitland; Taubman, *op. cit., supra,* note 6, pp. 121-124.

In essence, Congress passed a statute against restrictions and a statute against exclusion. The latter, Section 2, was premised upon freedom of entry into a trade or business. The former, Section 1, was intended to prevent particular restraints. Each section was designed to reinforce the other. Combining to monopolize was also a restraint—a total restraint, denial of freedom of entry. In turn, a combination of a number of restraints of trade might add up to exclusion by monopolizing. Indeed, Mason's statement that "The original meaning of monopoly was exclusion of others from the market by a sovereign dispensation in favor of one seller, has continued to mean exclusion in the broad sense of restriction of competition,"[43] may be expressed in the form of a syllogism: Form (combining) causes exclusion (monopolizing). Form (combination) results in restrictions (restraints of trade). Therefore, exclusion (monopolizing) causes restrictions (restraints of trade).

(d) *Holding Company Combinations*

The meaning of these phrases was elucidated by the judiciary in due course. In the meantime, New Jersey had paved the way for a third major form of combination in sanctioning the use of the holding company in 1889. Other states rapidly followed in permitting one corporation to own stock in another corporation.[44] This device enabled the combination movement to continue unabated for a time without the opprobrium of the trust.

During this period, the Supreme Court had little difficulty in declaring some of the combinations heretofore denominated as pools as unlawful restraints of trade.[45] But prior thereto, in 1895, the Supreme Court had held that the acquisition by the American Sugar Refining Company of the stock of four other companies was not in interstate commerce.[46] This decision gave a fillip to industrial combination. According to Montague, before 1897, there had been only 63 combinations. But in the next three years, there were 183,

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[43] Mason, *Economic Concentration and the Monopoly Problem* 344 (1957), Harvard Economic Studies, Volume C.

[44] Jones, *op. cit., supra*, note 2, at page 31.

[45] *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *U. S.* v. *Joint Traffic Association*, 171 U. S. 505 (1898); *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S. 211 (1899).

[46] *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1 (1895).

and 79 of these took place in the year 1899.[47] No wonder John Moody could write in 1904, "Nearly all of us are monopoly-seekers in one form or another . . . Such laws as the Sherman Antitrust Act prove little more than toys in the face of these natural tendencies." [48]

Ironically enough, by 1904, the Supreme Court held that the combination of a number of competing companies through the device of a single holding company, Northern Securities, violated the Sherman Act.[49]

Seven years later, the Supreme Court reaffirmed this view in the *Standard Oil* case and held that the combination resulting by use of the holding company must be dissolved.[50] The same result followed in the companion *American Tobacco* suit with respect to a consolidation arising without the use of the holding company device.[51]

But in the course of deciding *Standard Oil,* the Supreme Court enunciated the rule of reason. Combinations which did not unreasonably restrain trade did not violate Section 1 of the Act. The rule of reason was to be the yardstick for determination of liability. If combinations in restraint of trade were not to be considered unlawful *per se,* then a market analysis presumably would be necessary to ascertain whether or not under all the circumstances of a trade or industry the particular combination unreasonably restrained trade.

However, the rule of reason aroused fears that the Sherman Act might thereby be rendered ineffectual. As a result of the clamor for further antitrust legislation, the Clayton Act was passed in 1914.[52]

Section 7 of the Clayton Act prohibited the acquisition of the stock of one corporation by another where the effect is to substantially lessen competition between the acquired and the acquiring corporation or to restrain competition or to tend to create a monopoly.[53] Presumably its impact would apply to all stock acquisitions, whether by a holding company or operating company regardless of the technical form the merger took. Thus, merger, which hereto-

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47 Montague, *op. cit., supra,* note 3, at page 23.

48 Moody, *The Truth About the Trusts,* P. XVII (1904).

49 *Northern Securities Co.* v. *U. S.,* 193 U. S. 197 (1904).

50 *Standard Oil Co.* v. *U. S.,* 221 U. S. 1 (1911).

51 *U. S.* v. *American Tobacco Co.,* 221 U. S. 106 (1911).

52 38 Stat. 730, 731 (1914).

53 38 Stat. 731 (1914), 15 U. S. Code, Sec. 18; Sec. 7, Clayton Act.

fore had been a species of genus, combination, assumed the status of genus, merger, with respect to the Clayton Act, although it continued to be a species of combination under the Sherman Act.

Section 7 set forth a test which was narrower than restraint of trade. Quite apart from any impact upon third parties, if the merger substantially lessened competition between the merging corporations, there was a violation of Section 7.

Thus, Section 7 represented an extension of the antitrust laws into an area which Holmes believed, in his dissent in *Northern Securities,* was not covered. He wrote that, "Combinations, or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business." [54] Holmes would not apply the statute to the "cessation of competition among the partners," [55] nor to a community of interest where there was no external restriction.[56] Section 8 of the Clayton Act, however, attempted to prohibit combination through community of interest by prohibiting interlocking directorates.[57]

(e) *Trade Associations*

The period from 1914 to 1950 witnessed the regulation of combinations by the Sherman Act as well as the Clayton Act. With respect to pools, Stevens recognized as early as 1914 that the early methods of organization and operation of pools had been reproduced in more recent combinations and that quite often, the pool took the form of an association.[58]

Yet the pool differs in one major respect from many of the trade associations which were brought to court for alleged violation of the Sherman Act in the 1920's and 1930's. For example, Appalachian Coals, Inc., was created as an exclusive selling agency for 137 producers of bituminous coal.[59] The "open competition plan"

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54 *Northern Securities Co.* v. *U. S.*, 193 U. S. 197 (1904), Holmes dissent at page 404.

55 *Id.* at page 405.

56 *Id.* at pages 405-406.

57 38 Stat. 731 (1914), 15 U. S. Code, Sec. 19; Sec. 8, Clayton Act.

58 Stevens, *op. cit., supra,* note 14.

59 *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344 (1933).

of the American Hardwood Manufacturers Association had 365 members out of 400 belonging to the association.[60] The very size of such memberships virtually precluded their being formed by personal choice of associates. It is difficult to conceive of them as associations of personal characteristics—*intuitu personae,* such as the 22 member Maple Flooring Manufacturers Association might well be.[61]

But trade associations, unlike the pool, had developed functions of a more permanent nature, such as the exchange of trade information and statistics, even though the courts might have to decide which ones had combined unlawfully to fix prices and which had not.[62]

Thus, trade associations represented a form of combination whereby industry might validly associate freely to achieve certain aims, provided they did not restrain trade nor monopolize. Taxwise, these associations might be classified as corporations, even if unincorporated. However, some of them could conceivably qualify as exempt organizations.[63]

Indeed, the United States recognized the quasi-institutional nature of trade association in the NRA, pursuant to which each industry might regulate its affairs, including prices, by establishing a Code. Thus, until the NRA was declared unconstitutional, cooperation by trade association was given sanction, temporarily, in areas which might otherwise have been a violation of the Sherman Act.[64]

On the other hand, Section 7 of the Clayton Act, in due course, revealed certain defects as an anti-merger law. Since the statute had been enacted at a time when acquisition of stock was in vogue and acquisition of assets unusual, it failed to cover the latter contingency. Accordingly, mergers often assumed the form of acquisition of assets, until 1950, to escape the impact of the statute.

Post-NRA, trade associations became less important as the focus of antitrust activity. At the same time, Section 7 of the Clayton Act

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60 *American Column & Lumber Co.* v. *U. S.,* 257 U. S. 377 (1921).

61 *Maple Flooring Manufacturers Assn.* v. *U. S.,* 268 U. S. 563 (1925).

62 For example, that the *Appalachian* and *Maple Floor* combinations were permissible, but not the arrangement in *American Column & Lumber.*

63 Int. Rev. Code, Sec. 501 (6) includes business leagues and boards of trade among those which may qualify as exempt organizations provided they are non-profit.

64 Kaplan, *Big Enterprise in a Competitive System* 29 (1954).

continued to be weak until passage of the Celler-Kefauver amendment in 1950 which extended coverage to acquisition of assets.[65]

II. Oligopoly

(a) *Progenitors of Oligopoly*

Post-NRA, antitrust interest centered in combinations which had their progenitors in the earliest years after enactment of the Sherman Act. Pools could be formed by gentlemen's agreement or in secret.[66] After the dissolution of the Standard Oil Trust in 1892 and until the formation of the Standard Oil Company in 1899, the constituent companies carried on with a community of interest because the trustees of the dissolved trust were also the shareholders who were related to each other or had close ties.[67] Indeed, in 1895, in dissenting in *Knight*, Justice Harlan wrote: "Did any one expect to find in the written agreements which resulted in the formation of this combination a distinct expression of a purpose to restrain trade or commerce?" [68]

One might say that these problems foreshadowed a broader approach than had heretofore been necessary. In the main, however, the early forms of combination also went to the substance. The particular trust, holding company, or consolidation, whatever the form, generally aimed at and succeeded in embracing a substantial segment of an industry. If United States Steel Corporation was not to be considered a "bad trust," it was because its power was less than those of its competitors combined so that monopoly power was not achieved.[69] Perhaps a concomitant of dealing with relatively

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[65] Vukasin, Jr., *The Anti-Merger Law of the United States: Yesterday, Today, Tomorrow,* 3 Antitrust Bull. 309, 455 (1958).

[66] Notes 11 and 15, *supra.*

[67] Montague, *op. cit., supra,* note 3, at page 16; *Standard Oil Co.* v. *U. S.*, 221 U. S. 1 (1911), wherein early history of *Standard Oil* is set forth.

[68] *U. S.* v. *E. C. Knight & Co.*, 156 U. S. 1 (1895). *Cf., Interstate Circuit, Inc.* v. *U. S.*, 306 U. S. 208 (1939) where the court seized upon a circular letter by an officer of Interstate addressed to various officers of motion picture distribution companies as "a distinct expression" of conspiracy.

[69] *U. S.* v. *U. S. Steel Corp.*, 251 U. S. 417 (1920). Kales, *Contracts and Combinations in Restraint of Trade* (1918) has a heading for Chapter V—Combinations (Good and Bad Trusts). At page 40, he defines a trust as a combination, regardless of the form of organization. In Kales' classification scheme, then, *U. S. Steel* would be a "good trust."

simpler forms of combination is that the tests of liability are less abstruse. At any rate, even though U. S. Steel was a holding company for twelve operating companies and the largest in its field, the court was impressed by the abandonment of confederate action in the form of pools, associations, trade meetings, and social dinners at least nine months before suit was brought. Absent confederate action, the corporation was not liable as a pure combination because ". . . the law does not make mere size an offence or the existence of unexerted power an offence . . ." [70]

As *U. S. Steel* and the entire line of early cases indicate, the term, trust, was used as synonymous with combination, which was a term of art to describe well-known forms of combination, pools, trusts, holding companies, mergers, and consolidations. It is doubtful whether the courts were particularly concerned with the notions of loose combination or coalition where the pattern was not one of dominance by a single combination, as above, but of market activities of a few firms whose activities were considered together.

(b) *The Economics of Oligopoly*

When the courts turned to oligopoly, however, they fashioned new conceptual weapons out of existing notions to deal with the problem. The industrial pattern, as revealed by the T.N.E.C. reports,[71] was one of concentration of a few predominant firms in the key industries. Economists applied the term oligopoly to describe this phenomenon.[72] While economists wrestled with the shortcomings of the classic theory of pure competition, as opposed to pure monopoly, and proffered theories of workable competition, monopolistic competition and the like, to explain the operations of the market, where a few firms were dominant,[73] lawyers were compelled

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[70] *Ibid.* at page 451.

[71] See, *Final Report and Recommendation of the Temporary National Economic Committee,* Docu. No. 35, 77th Cong., 1st Sess. (1941), re Concentration of Economic Powers, pp. 3-43.

[72] See, Chamberlin, *The Theory of Monopolistic Competition* (1956), Chapter III, Duopoly and Oligopoly. In a duopoly, two firms are dominant.

[73] Chamberlin, *Ibid.;* Stocking, *On the Concept of Workable Competition as an Antitrust Guide,* 2 Antitrust Bull. 3 (1956); Knauth, *Business Practices, Trade Position and Competition* (1956) explains business practice in terms of a theory of trade position which should not be confused with monopoly.

to admit, "Practically speaking, there is no explicit antitrust law on oligopolies." [74]

Moreover, many of the terms used by economists were remote from anything resembling terms of art in law. Kaplan refers to circular integration as occurring when a firm diversifies its product line.[75] He uses the term, quasi-integration, to describe what Hale calls a collaborative subsidiary, e.g., a petroleum company setting up a new company with a coal company for the gasification of coal. [76] Papandreau and Wheeler use such terms as quasi-collusion and implied conspiracy.[77]

Indeed, Papandreau and Wheeler deplore the lack of correspondence between the lawyer's concept of loose and close combinations, which they consider formalistic, and the economist's of coalition and fusion, which they believe to be substantive.[78] However, examination of their definition of close combination will indicate that they have put their notions out of court. They say, "For the lawyer a combination will be considered to be a *close combination* if, in the emerging structure of the group, the legal power of exercising centralized control over the totality of the activities of the members of the group is conferred upon some particular legal person or group of persons. In all other cases the combination is defined as loose." [79] These criteria do not correspond to those of applicable legal categories. Pools, trade associations, associations generally, syndicates, joint ventures, and groups of all sorts may have centralized control conferred by agreement. Nevertheless, each and every one may be a loose, informal group. Mere delegation of authority alone does not achieve a correspondence to form of organization. In order for associations to be taxable as corporations, other tests besides delegation of authority must be met.[80]

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[74] Kronstein, Miller and Schwartz, *Modern American Antitrust Law* 44 (1958).

[75] Kaplan, *op. cit., supra*, note 64 at page 199.

[76] *Id.* at page 228. Cf. Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws*, 42 Va. L. Rev. 927 (1956).

[77] Papandreau and Wheeler, *op. cit., supra*, note 31, at page 243, "Quasi-collusion implies that the firms in a market adopt certain standards of behavior which make for 'parallel' or 'concerted' action without overtly arriving at an agreement to do so." Presumably this is "implied conspiracy"—page 245.

[78] *Ibid.* at pages 227-228.

[79] *Idem.* at page 227.

[80] Note 7, *supra*.

(e) *The Law of Conspiracy in Oligopoly*

Perhaps because economic notions were deficient as legal criteria, the court developed legal notions of conspiracy to deal with oligopoly. In 1946, the Supreme Court stated in the *American Tobacco* case: "It is not the form of combination or the particular means used but the result to be achieved that the statute condemns . . . The essential combination or conspiracy could be found, not necessarily in a formal agreement, but in a course of dealing or other circumstances as well as in an exchange of words." [81] Unity of purpose, common design or understanding, or meeting of minds in an unlawful arrangement was sufficient to justify a finding of conspiracy to monopolize under Section 2 of the Sherman Act, regardless of proof of actual exclusion by the three dominant cigarette manufacturers in the United States.

In the same year, the Expediting Court in *U. S.* v. *Paramount* held that eight motion picture distribution companies had violated the Sherman Act. It virtually equated combination with conspiracy stating: "That the combination is made up of a sum of separate licensing contracts individually executed does not affect its illegality, for tacit participation in a general scheme to control prices is as violative of the Sherman Act as an explicit agreement." [82]

Kaplan refers to two lines of antitrust attack, one, on forms of business organization, the other, on business practices.[83] Except for joint theatre interests, the motion picture distributors formally did not combine their business organizations. Combination was held to arise from conspiratorial concerted action with respect to particular business practices to which the defendants were party. Combination in conspiracy was the underlying concept for liability, even if clarity is lost as to the form of the combination. Its structure was secondary to the end result, the conspiracy, and its acts and practices.

This, in turn, permits a remarkable dialectic to take effect. Justice McKenna observed in *U. S. Steel* that independents were alleged by the government to be oppressed and imitating the corporation. However, confederate action was not alleged by the United

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81 *U. S.* v. *American Tobacco Co.,* 328 U. S. 781, 809-810 (1946).

82 *U. S.* v. *Paramount,* 63 F. Supp. 323, 339 (1946).

83 *Kaplan, op. cit., supra,* note 64, at page 7.

States. If it were, "The competitors would cease to be the victims of the corporation and would become its accomplices." [84] In *U. S.* v. *Paramount,* the three non-theatre-owning defendants, Columbia, Universal and United Artists, the so-called minor defendants, "acquiesced" in the conspiracy of the five theatre-owning defendants. The Expediting Court held that "Acquiescence in an unreasonable restraint, as well as the creation of such a restraint, violates the Sherman Act." [85]

(d) *Market Power and Conspiracy*

Acquiescence in this case added the components necessary for a finding of horizontal integration. On appeal, the Supreme Court reversed in part and remanded so that the Expediting Court might make findings with respect to the impact of market power.[86] The Supreme Court wanted to know whether the findings showed not only a conspiracy in restraint of trade, but also a conspiring to monopolize, warranting divorcement and divestiture. This might be shown if there were a vertical conspiracy, since vertical integration was not unlawful *per se.*

Although Mason has asked " . . . whether market behavior rather than conspiracy has not become the test of illegality." [87] the Supreme Court apparently viewed the two concepts as not mutually exclusive. In *American Tobacco,* it had pointed out that power to exclude, though unexercised, might constitute monopolization.[88] In *Paramount,* it indicated that power utilized in the past to prevent competition was potent evidence of the presence of monopoly power. In short, market behavior may show market power expressed in terms of conspiracy. On remand, the Expediting Court made findings of monopolization, i.e., market power, by way of a horizontal

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[84] *U. S.* v. *U. S. Steel Corp.,* 251 U. S. 417, 449 (1920).

[85] *U. S.* v. *Paramount,* 63 F. Supp. 323, 352 (1946).

[86] *U. S.* v. *Paramount,* 334 U. S. 131 (1948). The Supreme Court set aside the findings of the Expediting Court on divorcement and divestiture, and remanded with directions to make findings whether the conspiracy also violated Section 2 of the Act.

[87] Mason, *Economic Concentration and the Monopoly Problem,* 363 (1957), Harvard Economic Studies, Volume C.

[88] *U. S.* v. *American Tobacco Co.,* 328 U. S. 781, 810 (1946).

conspiracy to fix prices, runs and clearances which was powerfully aided by the vertical integrations.[89]

In the last analysis, however, the decision must be cast in terms of the statute, which provides liability for "combination or conspiracy in restraint of trade" and for "combining or conspiring to monopolize." Even findings of fact expressed as control of the market must ultimately be phrased in combination and conspiracy language.

III. The Concept of Combination

(a) *The Meaning of "Combination"*

But just what does this language mean? Much of the flavor of the term, combination, has been lost in the course of the past seventy years compared to its original connotations when the combination movement agitated men's souls. Much of its flavor has gone into the term, conspiracy, which, depending upon whether one is suing or defending, is a term of sex appeal, or a dirty word. Does it really matter that the term, combination, has now gone into limbo to the point where it is mainly recited almost as a liturgical incantation in a complaint or decision that the defendants "combined and conspired?"

Indeed, we have no less an authority than Professor Handler, stating: "There is no authoritative definition or even any helpful discussion of 'combination' in uses before the Sherman Act. Neither at common law nor in the construction of the statute has it been of any practical importance to draw any fine distinctions between contracts and combinations on the one hand and combinations on the other . . ." [90]

Perhaps this view reflects a judicial and non-judicial pragmatism that it did not really matter, practically speaking, whether or not these terms were finely conceived since all of them, considered together, expressed the notion adequately for determination of liability. Therefore, it is unimportant, in such a view, that the term, combination, had become vestigial and that the term, conspiracy, covers all forms of concerted action. It is submitted that analysis of the

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[89] *U. S.* v. *Paramount,* 85 F. Supp. 881, 894 (1949). On remand, the Expediting Court granted the Government's prayer for divorcement and divestiture.

[90] Handler, *Contract, Combination or Conspiracy,* page 38, A. B. A. Section of Anti-Trust Law (1953).

term, combination, may compel us to reconsider its value conceptually and to reappraise its utility.

(b) *"Combination" Defined*

What is a combination?

Joyce defines it as "... the union or association of two or more persons or parties in the attainment of some common end." [91] He adds, however, that it is "... a word not yet possessed of an accurate legal meaning; its place in criminal law is, I believe, no older than this statute." [92]

Corpus Juris Secundum indicates that the term, combination, is used in several different senses: "Of itself it means no more than cooperation—a union of efforts; a mere meeting of the minds of two or more persons to accomplish a common purpose; an agreement between two or more persons; an alliance, association, coalition, confederacy, or union of certain persons for certain purposes, and necessarily involves two or more persons." [93]

It is noteworthy that the various bills offered in Congress, prior to the enactment of the Sherman Act, contained a variety of terms in one bill or another, including such words as consolidation, aggregation, confederation, amalgamation, affiliation, scheme, design, arrangement, understanding, union and practice. Instead, a single term, combination, was adopted in the Sherman Act to cover most of these words.[94]

However, the dictionary definition of the word, combination, furnishes a clue to the wisdom of the choice made by Congress. Funk and Wagnall define combination as: "(1) A joining together so as to form a whole, or the whole produced by combining; a conjunction; (2) The union or alliance of persons for the prosecution of a common object, also, the association thus formed; (3) Chem. The union of elements in certain fixed proportions, of the compound thus resulting; (4) Math. A group of several things as symbols in which the order of arrangement is indifferent, distinguished from

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[91] Joyce, *Monopolies and Unlawful Combinations or Restraints* 1 (1911); to the same effect is Thornton, *A Treatise on Combinations in Restraint of Trade* 329 (1928).

[92] Joyce, *id.*, note 91.

[93] Combination, 15 C. J. S. 240 (1939).

[94] Bills and Debates in Congress Relating to Trusts, *op. cit., supra,* note 29.

permutation." [95] It is derived from the Latin—*combino, cum,* meaning together and *bini,* made up of two, double, paired. The term, binary, is defined as a combination of two things, a couple, a duality.[96]

It is submitted that the key to the meaning of the term, combination, may be found in its derivation. Combination is not expressed in the form of addition to appear as a plus b plus c equals combination x. Rather the components are stated merely as symbols, placed side by side in the form abc equals combination x.

The root, *bini,* already expresses the notion of coupling of components. The prefix, *cum,* then, is decisive in giving the conception of combination meaning. The effect of joining components produces something new, an arrangement of heretofore discrete units. The sequence or order of each component in the arrangement is immaterial, but the act of bringing together these components is crucial because every act of combination also generates the result of bringing the components together, the combination itself.

That is, the combination generated may differ in quality as well as quantity from the sum of the respective parts. Although quantitative changes may arise from the cancellation of overlapping components of the combination, qualitative changes may arise without any overlapping. Industrial combination may be a new quality because the act of combination may generate power—power to restrain trade, power to exclude competition.

The combination created is really a configuration of the components into a certain size and shape. Given the same components, the configuration remains the same regardless of the period of time involved. A characteristic of combination, then, is its constancy.

(c) *Conspiracy Combination*

In this respect, it differs drastically from conspiracy. The components of combination are fixed *ab initio.* Hence, addition or subtraction of even a single component at any time thereafter changes the combination. This is not so with conspiracy.

At any given time, one or more components may join an existing conspiracy or abandon it. The conspiracy may continue as one and

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[95] Funk & Wagnall's New Standard Dictionary of the English language (no year given).

[96] *Idem,* definition of binary.

the same conspiracy, but each addition or subtraction changes the combination.

Herein lies a source of confusion between conspiracy and combination stemming from the definition of conspiracy. Since conspiracy is a combination of two or more persons for an unlawful purpose or for an unlawful end by lawful means, every conspiracy imports a combination.[97] But there the similarity ends.

Every conspiracy starts with some combination. But industrial combination has been used in a static sense and conspiracy in a dynamic one. That is, membership of a given combination generally remains the same throughout the period of combination involved. On the other hand, a conspiracy may be hatched by a combination of two or three, grow to a membership of thousands and decline in numbers just as rapidly. Nevertheless, because the starting point is some combination, the Supreme Court was able to use the expression in *U. S.* v. *Paramount,* ". . . the combination which launched the conspiracy." [98]

Another distinction arises from the number of components in industrial combination; these have generally been small. Since the members have generally known each other, the association, from this point of view, has been personal rather than anonymous.[99] This is not necessarily so in a conspiracy. Each conspirator plays an allotted role in the common design, whether or not it is aware of the scope of the entire design or of the presence or role of the other members. Because conspiracies can be fluid and anonymous at the same time, historically their organization has been dreaded by the powers that be.

This does not mean that a conspiracy may not be constituted by a given combination without change from inception to termination. Often such a coincidence is achieved by the application of theories of legal personality and agency to the actualities of industrial combination.

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97 Taubman, *The Performing Arts and the Anti-trust Laws,* 43 Corn. L. Q. 428, 436 (1958).

98 *U. S.* v. *Paramount,* 334 U. S. 131, 171 (1948).

99 The paradox is that although each component may be an anonymous association of capital in the form of a public-issue corporation, their relationship as entities may be personal, as in a partnership, where permissible, or in a joint venture.

(d) *Legal Personality and the Theory of the Firm*

Classically, one might say that the public-issue corporation has been considered as an anonymous aggregation of capital, however one might classify the close corporation. The close corporation, on the other hand, has been variously called an incorporated partnership, a hybrid, and a personal association with limited liability.[100]

Since the public-issue corporation is less likely to be treated as the alter ego of its owners, there is little doubt that it is, in most instances, personified without piercing the corporate veil.[101] Since shareholders are not necessarily known to each other and are associated only in ownership of shares of capital, the anonymous aggregation of the common fund is hypostatized into a legal entity. Its officers and other employees act as agents on its behalf, the personified legal person, the corporation. By this legal fiction, the legislative decisions of its board of directors as well as the administrative ones of its officers are accorded sanctity and trust to be performed by those held to a higher standard as actors in a fiduciary capacity. Ultimate power vests in the anonymous aggregation of shareholders, who, from time to time, elect the directors, who, in turn, select the officers.

No matter how many employees are hired by the officers, the corporation is still considered as a single legal person. The entity might have over 100,000 persons, but it is still considered as a unit. For legal personality is a unitary theory; one corporation is one person. Hence, the combination in *American Tobacco*[102] is considered as that of three—three corporations engaged in cigarette manufacture. In motion pictures, the key is eight—eight corporations were alleged to have combined in *U. S.* v. *Paramount.*[103]

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100 See, Foreword, *The Close Corporation,* 18 Law and Cont. Probs. 433 (1953), and Hornstein, *Judicial Tolerance of the Incorporated Partnership, Ibid.* at page 435; Rohrlich, *Organizing Corporate and Other Business Enterprises* (Revised Ed. 1953). The Close Corporation, at pp. 96-136, inclusive.

101 But see, *Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307 (1939); Israels, *Implications and Limitations of the Deep Rock Doctrine,* 42 Col. L. Rev. 376, 379 (1942). See also, Wormser, *Piercing the Veil of Corporate Entity,* 12 Col. L. Rev. 496 (1912).

102 *U. S.* v. *American Tobacco Co.,* 328 U. S. 781 (1946).

103 *U. S.* v. *Paramount,* 334 U. S. 131 (1948).

Strong extraneous support for this theory is furnished by the economists and sociologists, although for other reaons. The economists' preoccupation with models enables them to apply some of the techniques of science, i.e., mathematics and statistics, to their abstractions.[104] Their working concepts of oligopoly and duopoly are, for example, in reality models which posit legal personality of the firm. Therefore, the industrial combinations considered by economists are those of a few corporations, as in oligopoly, because each corporation is considered as a legal person.

By contrast, sociologists have found solace in applying statistics and mathematics, not to legal persons, but to individuals. However, the groups most amenable to such study have been small groups. An impressive body of literature has now been developed by sociologists with respect to combinations of individuals in small groups.[105]

This "small-group-mindedness" of economics and sociology is also reflected in antitrust law. Although large corporations are generally the object of regulation, their combinations are mainly into small groups. As in economics, the combination of a few firms to dominate a market may be called oligopoly. As in sociology, the law of combinations becomes the study of small groups, except that legal persons rather than individuals are the group components.

Because legal personality is a fiction, it must act through representatives. The attribution of personality to an abstraction is given life by acts performed in its behalf by officers, directors, employees, and other persons, both live and juridical, as its agents. Their acts within the scope of employment or agency bind the corporation. Actually, the inert, inanimate corporation can combine or conspire only by the acts of its agents.

Having given the corporation the status of a legal person which can act through its agent and therefore can be held responsible, the bench and bar are able to use the terms, "combined and con-

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104 Chamberlin, *op. cit., supra,* note 72; Von Neumann and Morgenstern, *Theory of Games and Economic Behavior* (1944); Maurer, *Great Enterprise, Growth and Behavior of the Big Corporation* (1955); Abbott, *Quality and Competition, An Essay on Economic Theory* (1955).

105 See, Strodtbeck and Hare, *Bibliography of Small Group Research* (from 1900 through 1953), XVII Sociometry pp. 107-178 (1954). See also, Taubman, *"Law and Sociology in the Control of Small Groups,"* appearing in 13 University of Toronto Law Journal 23 (1959).

spired," as the two axes of the shaft for hauling antitrust liability. Combination is the shaft for carrying all static notions of coupling components; conspiracy hauls all dynamic notions of collusive coming together. Their joinder assures that one pole or the other of the shaft will bear the weight without undue concern about either.

(e) *The Converse of Combination*

Combination, of course, is teleological. Purpose in coming together delimits the area of association and the issues involved. In industrial combination, purpose is of an economic nature. Hence many notions of economics must necessarily be applied in testing the efficacy of the combination, e.g., whether or not the combination results in a vertical or horizontal integration. Another example is the power concept inherent in a test of monopolization under Section 2 of the Sherman Act. Indicia of power may be determined from the size and shape of the combination in relation to the relevant market. In a teleological sense, then, one must ask of combination which restrains or monopolizes, power for what?

Perhaps we must make a melancholy observation with Berle that, "We know little about power . . . We know that it is inseparably bound to institutional organization of which we know very little." [106]

We propose to examine this from a different point of view, the converse of combination. At the outset, one finds that there is scarcely a satisfactory term to describe the opposite of combination. Dissolution is the process of termination of the legal fiction; corporate life ends with it. Liquidation is the process resulting in economic death of a firm. Assets of the corporation are distributed to the owners of the corporation, usually as an incident to dissolution. Divorcement and divestiture refer to the separation of segments or units of an integrated enterprise, such as the separation of theatre ownership and operation from distribution in the motion picture industry as the aftermath of *U. S.* v. *Paramount*.[107]

Dissolution and divorcement and divestiture have been judicial modes of breaking up combinations exercised by courts with equitable

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106 Berle, *The 20th Century Capitalist Revolution* 32 (1954).

107 *U. S.* v. *Paramount*, 85 F. Supp. 881 (1949), on remand from Supreme Court, 334 U. S. 131 (1948); Timberg, *Divestiture as a Remedy Under the Anti-Trust Laws*, 19 Geo. Wash. L. Rev. 119 (1950).

powers. Dissolution, for example, was decreed in the early ***Standard Oil*** and *American Tobacco* cases.[108]

However, these notions are inadequate to describe the erasure of the combination configuration because they are merely species of the genus, converse of combination. Dissolution can break up a firm, be it a holding company, or an operating company arising out of consolidation or merger. There is nothing of this nature to dissolve in oligopolistic combination. The court enjoins the members of the conspiracy from engaging in certain practices. The decree, in effect, is a cease and desist order. Divorcement and divestiture merely separate a phase of an industrial combination which may be instrumental in vertical integration.

It is submitted that a term used by Neumann and Morgenstern in their book on mathematical economics[109] best serves as a genus for converse of combination. The term is "decomposition." If combination is configuration, then the opposite of combination is decomposition of the configuration. There may be a reduction of the form by way of a decomposition partition as in divorcement and divestiture, or there may be an elimination of the form as in dissolution of the firm or prohibition of the conspiracy. In any event, decomposition erases the configuration.

However, since the concern of the antitrust laws is with combination, the Department of Justice and the courts are interested in decomposition as an effective aid in breaking up existing prohibited combinations or in preventing unlawful new ones. At the risk of contempt of court for failure of the defendants to comply, the courts can decompose combinations found to be illegal by dissolution or divorcement and divestiture. Moreover, they can prevent combination at its incipiency under Section 7 of the Clayton Act when a merger is found to lessen competition.[110]

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108 *Standard Oil Co.* v. *U. S.*, 221 U. S. 1 (1911); *U. S.* v. *American Tobacco Co.*, 221 U. S. 106 (1911).

109 Neumann and Morgenstern, *The Theory of Games and Economic Behavior* (1944), at pp. 353, *et seq.* The Decomposition Partition.

110 See the opinion of Judge Weinfeld, handed down, November 20, 1958, *U. S.* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576 (1958). See, Mergers, Barnes, Levi and Tone, in the Conference on the Antitrust Laws and the Attorney General's Committee Report, at pages 57-94 (1955).

Yet the law, it seems, has little interest otherwise in decomposition as such. Technological changes or business recession, or both, may affect the size and shape of industries, e.g., airplane, railroad, automobile and motion picture industries. Whole segments of an industry may be liquidated by a firm and yet it may not be any concern of the antitrust laws. It is theoretically possible for the entire American industry to decompose without the guardians of the antitrust laws becoming involved. For example, it has been contended recently that motion picture companies should liquidate because they are worth more dead than alive. That is, they can realize more by sale of their pictures to television and of their real property, including studios, than by continuing to produce motion pictures. Theoretically, oligopoly could be decomposed without reference to the decrees in *U. S.* v. *Paramount,* which are still very much in effect.[111]

This legal unconcern with decomposition may have arisen because our notions of power are wedded to those of legal personality. Although individuals are named as defendants, together with their corporations, from time to time, the corporations are generally considered as the main defendants. It is their combinations and their power that is at issue. Even if one were to establish management as the focus of power,[112] in antithesis to absentee ownership, the result does not change. In either event, the norm is the corporation. Industrial combination, as it begets power, has been corporate in form. Perhaps decomposition may represent diminution in power for which legal rules have not been formulated simply because we are not interested in decrease in power except as it impinges upon power.

IV. Paper and personification

(a) *The Gap in Section 7*

Concretely, the preoccupation with legal personality has had the effect of inadvertently opening a gap in the anti-merger law. Vukasin writes: "The scope of the original section was clearly limited. It referred only to an acquisition *by* a corporation, thus excluding from

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[111] *U. S.* v. *Paramount,* Equity No. 87-273, District Court for the Southern District of New York. There are hundreds of entries in the docket book with respect to proceedings had in connection with the decrees from the time of the entry of the RKO consent decree in November, 1948, when the first of the decrees went into effect, to date.

[112] Berle and Means, *The Modern Corporation and Private Property* (1932).

its range such action by any other form of business enterprise (e.g., partnership, sole proprietorship, etc.). Similarly, it was effective only when the acquired firm was also a corporation." [113] Even after Section 7 of the Clayton Act was amended in 1950 to apply to acquisition of assets as well as to stock, it was still limited by its terms to corporations.[114]

Since Section 1 of the Clayton Act defines "person" to include associations as well as corporations,[115] may Section 7 be construed as including unincorporated associations having corporate characteristics? In this respect, the Internal Revenue Code explicitly defines corporation to include associations.[116] Moreover, the Internal Revenue Service has declared that local law is not controlling for tax purposes and enunciated its own classification in its Treasury Regulations.[117] In the absence of Congressional intent, the courts must resort to the common law. State law is controlling.[118] Depending upon its form and local tests, the association may be pure trust, partnership or corporation.[119]

To add to the confusion, *Bender* v. *Hearst,* decided in June, 1957, held that acquisition of assets from an individual did not come within the terms of the statute even where the individual had organized a corporation to perform some services in connection with his sole proprietorship.[120] The court distinguished the limited func-

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113 Vukasin, *op. cit., supra,* note 65, at page 312.

114 38 Stat. 731 (1914); 15 U. S. Code, Sec. 18; Sec. 7, Clayton Act, as amended 64 Stat. 1125 (1950), reads, in part: "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce, in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

115 38 Stat. 730 (1914), 15 U. S. Code, Sec. 12; Sec. 1, Clayton Act.

116 Int. Rev. Code, Sec. 7701(a)(3).

117 Regs. 138, Sec. 39.3797-1. "For the purpose of taxation the Internal Revenue Code makes its own classification and prescribes its own standards of classification. Local law is of no importance in this connection." The pertinent regulations are Regs. 138, Secs. 39.3797-1 through 39.3797-6, inclusive.

118 *Erie* v. *Tompkins,* 304 U. S. 64, 78 (1938), Brandeis, *J.* "There is no federal general common law."

119 Note 24, *supra.*

120 *Bender* v. *Hearst,* 152 F. Supp. 569 (D. Ct., Conn. 1957), affirmed 263 F. 2d 360 (C. A. 2nd, 1959). On appeal, the Court affirmed the dismissal of the Section 7

tions of the corporation as agent for the sole proprietorship, from the ordinary family corporation, which is controlled by an individual and which is within the purview of Section 7. Here the corporation neither transferred nor owned any assets and was ancillary to the individual's enterprise.

This decision, plus the absence of any explicit classification of associations as corporations in the Clayton Act, indicates that the door may be wide open to mergers of all sorts of unincorporated groups without application of the anti-merger law. Thus, whatever the effect of the *DuPont-General Motors* decision of 1957 as new doctrine,[121] it does not apply. Partnerships, joint ventures, syndicates, unincorporated associations of all sorts, may merge freely with each other. Corporations may acquire interests or assets in unincorporated enterprises of all kinds. Unincorporated enterprise, likewise, may acquire corporations, via stock or assets. If the Sherman Act is not thereby transgressed, these mergers are not illegal. There is nothing to prevent a corporation from dissolving and an unincorporated successor participating in a merger, so long as the unincorporated association has a business purpose and is not a device for avoidance of the statute.[122]

Thus, strict application of the corporate fiction has resulted in a gap in the antitrust laws. Section 7 of the Clayton Act should be amended to apply to unincorporated groups of all sorts as well as sole proprietorships. Otherwise, the loophole may render the statute ineffective, notwithstanding the *DuPont-General Motors* decision. Recent tax history has shown the great extent of use of unincorporated forms where tax advantages inure therefrom. It is ironic that partnerships and other groups filing returns as partnerships may now elect, if they qualify, to file corporate returns.[123] Thus, they may now get all corporate advantages taxwise and still avoid the impact of the antitrust laws!

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claim. It found no private injury and so did not consider whether the transfer of the assets was not a corporation within the meaning of the statute.

121 *U. S.* v. *E. I. du Pont,* 353 U. S. 586 (1957).

122 The Supreme Court has held that no effect will be given to a corporation for tax purposes if it served no business purpose. *Gregory* v. *Helvering,* 293 U. S. 465 (1935), affirming 69 F. 2d 809 (C. A. 2nd, 1934). Presumably if dissolution were merely a subterfuge for evasion of Section 7 of the Clayton Act, no effect would be given to the change in form of the enterprise.

123 Int. Rev. Code, Sec. 1361.

(b) *Legal Paper and Power*

This gap points up the problem. Perhaps we have personified without looking too closely at legal personality. Business reality indicates that the corporation is merely a device set into operation by legal paper, the filing of a certificate of incorporation.[124] From the point of view of those in control of aggregations of capital, this is well understood. They will adopt the form of business organization that they and their advisers deem most suitable, whether or not it has legal personality. *A fortiori*, their combinations may be informal and unincorporated, as in a joint venture and pool.

This does not mean that the focus of power in decision-making can be isolated or is simple to find. Men in control may be silent partners or undisclosed principals. Behind present power there may also be future power. Some may have initiated plans for succession after their death or retirement by way of trust or otherwise. Extra-legal power may sometimes be even more important than formal legal power. We need only mention wives, mistresses, brain trusts and Rasputin, to name a few. Finally, the focus of power may be ill-defined within an organization. The source of power may vest in persons with no definable title in the table of organization of an enterprise or it may be dispersed in an elaborate chain of command. Finally, power itself is not static; it changes constantly in the push and pull and give and take of its exercise.

Power, then, seems to be personal. What constitutes power may be an abstraction. Those who may receive its impact may view it anonymously. As to them, it may seem to be impersonal coming from on high. As to them, legal personality may personify power.

If industrial combination is primarily combination of small groups, and if the components of combination, corporations, are merely devices of business organization, then we must conclude that these combinations are personal. That is, individuals with effective power combine their assets or enterprises using one form or another. Effective power vests in those who can make the decisions. The New York Times recently described a trend to diversity by use of holding company pyramids. The article states, "The pyramids themselves usually reflect the personality and interests of the financier who

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124 Freund, *The Legal Nature of Corporations* 83 (1897).

directs them." [125] Live persons, then, in each instance, exercise power, be it individually or by consensus in decision-making. They associate with other live persons in decision-making. Their decisions are reflected in business structure and combination. In form, power may be transmitted by legal paper, agreements, and written documents of all sorts. The law, in turn, recognizes the validity of the transmission of power and its transmutations and enforces it by legal sanctions. To that extent, the antitrust laws attempt to set limits of permissible power.

(c) *Joint Interests*

But the power of combination is not merely or mainly one of size. As the focus of the limits of permissible power, the antitrust laws have been sensitive to such configurations. Those who make decisions, however, are much more modest in their conception of the term. Their notion of combination is more akin to a theory of joint interests. Joyce has written, "The words 'combination in the form of trust' in a State statute is declared to mean just what in popular language is expressed by the word pooling . . . " [126] Their notion is a pragmatic, popular one, to adopt the most practical form of organization that is feasible to them and their advisers. For example, in one instance, a patent pool may be set up in form of a holding corporation;[127] in another, members of a pool may assign patents to one of them to hold for the pool.[128]

This facility was evidenced in *U. S.* v. *Paramount,* where the Expediting Court indicated, "It is claimed by plaintiff that the theatre-owning defendants have combined with each other and with independent theatre-owners by 'pooling' their theatres through operating agreements, leases, joint stock ownership of theatre-operating corporations, or through joint ownership of theatres in

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125 John S. Tompkins, "Pyramid Device of 20's Revived," *New York Times,* Sunday, November 16, 1958, Section 3, Financial and Business Section, Page 1, Column 2.

126 Joyce, *op. cit., supra,* note 91, Sec. 51, at page 56.

127 *U. S.* v. *New Wrinkle, Inc.,* 342 U. S. 371 (1952). This would cease to be a pool for tax purposes. Cf., Int. Rev. Code, Sec. 7701(a)(2).

128 *U. S. Consolidated Seed & Raisin Co.* v. *Griffin & Skelley Co.,* 126 Fed. 364 (C. A. 9th, 1903).

fee." [129] Moreover, *Dipson*[130] and *Fifth and Walnut*[131] indicated that such joint interests were not illegal *per se,* but were condemned because of the surrounding circumstances in *Paramount.*

Joint interests of this sort indicate the difficulty of application of the term, combination, to it. Pooling of patents, for example, is a combination of assets which may be effected without the use of any form of business organization. In designating this as combination, we are adding a doctrine of implied combination analogous to designating concerted action as conspiracy.

Yet, it is precisely in the area of joint interests where it may be possible to break away from the rigidity of ill-defined labels. For the area of joint interests is also the area of joint ventures, and the concept of joint venture may be useful in designating joint activities that would not run afoul of the antitrust laws. As Edmond Cahn has indicated, "For in the contemporary American scene with its close-knit industrial organization and its manifold financial interdependencies, ours is not merely, as some seem to think, the age of managers; it is, perhaps more significantly the age of coadventurers." [132]

If this is in fact an age of joint venture, i.e., association of two or more natural or juridical persons to carry on as co-owners an enterprise, venture, or operation for the duration of that particular transaction or series of transactions or for a limited time,[133] then we ought to acknowledge the fact and live with it. Perhaps we ought to get away from the tautological impact of combination and conspiracy into the world of joint interests. Some state antitrust laws quite candidly state that a combination is a conspiracy. The Sherman Act is a bit more oblique. By making a combination in restraint of trade or to monopolize a misdemeanor, it automatically makes it a conspiracy, since a conspiracy is a combination by unlaw-

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129 *U. S.* v. *Paramount,* 63 F. Supp. 323, 350 (1946).

130 *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.,* 190 F. 2d 951 (C. A. 2nd, 1951), cert. den., 342 U. S. 926 (1952).

131 *Fifth and Walnut* v. *Loew's, Inc.,* 176 F. 2d 587 (C. A. 2nd, 1949), cert. den., 338 U. S. 804 (1949).

132 Cahn, *The Moral Decision* 150 (1956).

133 This is the author's definition of joint venture. See, Taubman, *op. cit., supra,* note 6, Chapter IV, "What Constitutes a Joint Venture"; also, in 41 Corn. L. Q. 640 (1956).

ful means or for an unlawful end. Judicial equation of combination and conspiracy is a logical concomitant thereof.

Perhaps a theory of joint interests will be given more weight when it is presented properly. In *Timken Roller Bearing,* appellant argued that the restraint of trade was reasonable because it was ancillary to the main legal transaction, a joint venture between appellant and one, Dewar, with whom appellant was interested in British Timken. The Supreme Court rejected this argument, stating, "We cannot accept the 'joint venture' contention. That the trade restraints were merely incidental to an otherwise legitimate 'joint venture' is, to say the least, doubtful." [134] It is noteworthy that the Government had charged violation of the Sherman Act by price-fixing, and the allocating of territories and protecting of markets with British and French companies, using the "Timken" trademark. The Supreme Court adverted to the conspiracy between American Timken and British Timken in which it had a large or major interest. This impelled it to state, "Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled." [135]

Suppose there were no other enterprise involved allegedly ancillary to a joint venture. Suppose, instead, that the Court had to consider a joint venture, pure and simple, as a combination. Unlike a pool, the term does not have a past antitrust history with overtones of illegality. It would be interesting to see how judicial analysis would adapt it to the world of antitrust taxonomy and nomenclature.

Indeed, the usefulness of any theory of joint interests presupposes its exposition conceptually in relation to the antitrust laws. It is unfortunate, therefore, that Hale's collaborative subsidiaries in corporate form are treated by him as joint ventures. He cites *Imperial Chemical* in support of his contention. But Judge Ryan states therein, "It is settled that *joint manufacturing ventures,* even in domestic markets, are not unlawful *per se* by the Sherman Act, but become unlawful only if their purpose or their effect is to re-

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[134] *Timken Roller Bearing Co.* v. *U. S.,* 341 U. S. 593, 597 (1951).

[135] *Id.* at page 598.

strain trade or to monopolize. (Citation.) It is also clear that absent this wrongful purpose or harmful effect there is nothing *per se* unlawful in the association or combination of a single American enterprise with a single local concern of a foreign country in a jointly owned manufacturing or commercial company to develop a foreign local market." [136] Hale apparently derives the term joint venture from "joint manufacturing venture" to classify his corporate subsidiaries established by two separate companies.[137] It is submitted that Judge Ryan's term was not intended as a term of art and that it was therefore a different usage from the ordinary joint venture, which is a term of art.

For a joint venture is a form of unincorporated association, even though corporations may be in joint venture. It is true that in a number of jurisdictions, a co-adventurer may pursue his rights against his associates after transformation of the joint venture into a corporation. In those states, a plaintiff may have an accounting because the joint venture agreement survives the subsequent incorporation of the venture.[138] This is the best that can be said in support of Hale's proposition because in other jurisdictions, such as New York, the joint venture does not survive incorporation.[139] It is difficult to see how collaborative subsidiaries in corporate form can be classified as joint ventures if there is no dispute between the associates as to their rights. Nothing in the nature of joint venture obligations is at issue in Hale's antitrust exposition of collaborative subsidiaries.

It is submitted that use of the term joint venture in this context weakens the utility of the conception generally, and particularly in the elaboration of a theory of joint interests in antitrust law.

Conclusion

We need clarity of expression more than ever today. If terms are to be used in new senses, let us make sure that there is a firm

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136 *U. S.* v. *Imperial Chemical Industries*, 100 F. Supp. 504, 557 (1951, S. D. N. Y.). (Emphasis added.)

137 Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws*, *op. cit. supra*, note 76.

138 *De Roy* v. *Harris*, 207 Md. 212, 113 A. 2d 903 (1955); Note, Corporations, Does a Joint Venture Agreement to Use the Corporation as a Medium Survive Incorporation, 44 Cal. L. Rev. 590 (1956).

139 *Marathon Motors, Inc.* v. *Atlas Buick Co.*, 150 N. Y. S. 2d 289 (1956).

foundation for extension of the concept. If not, let us coin new terms to fit the new notions.

Ultimately, we must determine whether or not the antitrust laws should be codified. The Sherman Act came to pass because it was politic at the time and nobody really opposed it. Twenty-four years later the Clayton Act followed in 1914. By 1950, the asset loophole of Section 7 thereof was plugged. At this rate, the limitation of the anti-merger law to corporations will not be lifted until about 1975! If it be contended that each act is short so that codification is unnecessary, then the Clayton Act should be amended forthwith to cover merger of unincorporated groups.

Perhaps the time has come to look beyond the confines of the antitrust laws in assessing the development and meaning of terms such as pools, combinations, conspiracies, and joint ventures. Rather than place reliance on inferences, permitting equation of concerted or parallel action with combination and conspiracy, in an economy where joint enterprise abounds in all forms, perhaps we should re-evaluate our conceptions so that our tools will accord with the realities of everyday living. For already our novelists are writing, "The very word 'merger' is a misnomer. One side or the other takes over. People get hurt. Mergers are the economic fashion of the hour. An average of a thousand per year, and they are changing the face of the nation. I don't know if this is a disease, a madness, or a blessing. I only know that, if one goes through a merger, it's a damned good idea to be on the winning side."[140] As the title of Sterling Quinlan's novel, "Merger" indicates, one of the main currents of industrial combination is now under literary scrutiny.

The law, primarily, can make an affirmative contribution to mitigate the rigors of industrial combination. The age of diversification may also be the age of joint interests. In a period of ever-accelerated technology, decomposition of combinations proceeds apace. The effect may be to transform the "organization man" into the "disorganization man," both in areas of antitrust and non antitrust impact. Perhaps the law should take counsel of the social and economic factors in this new stress and strain in order to re-evaluate the role of trade regulation.

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140 Sterling Quinlan, *The Merger,* Doubleday (1958), at page 33. Quinlan's story involves a merger which included the elimination of one of two heretofore competing television stations in Chicago and the impact of the merger upon the executives involved.

ECONOMIC CHANGE AND THE SHERMAN ACT: SOME REFLECTIONS ON "WORKABLE COMPETITION"

by

GEORGE W. STOCKING*

In *Appalachian Coals, Inc.*,[1] Chief Justice Hughes characterized the Sherman Act as a "charter of freedom" with "a generality and adaptability comparable to that found to be desirable in constitutional provisions."[2] In making this pronouncement the Chief Justice was laying the basis for a decision more consistent with the temper of the times than with legal precedent. The Great Depression had laid low the national economy. Millions were unemployed, national income had shrunk, corporate profits had disappeared, labor unions had disintegrated, farmers were losing their farms, business firms faced bankruptcy, competition had become cutthroat, confidence in private enterprise had waned, fear and even hunger stalked the land. Businessmen, labor leaders, and politicians were insisting that competition must give way to cooperation if a business system was to be salvaged. A sick economy had aggravated the sickness of an industry. The Supreme Court in 1933 found Appalachian Coals, Inc. to be a cooperative sales agency designed to "foster fair competitive opportunities" and "thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis."[3]

Seven years later, with the unlamented National Recovery Administration a matter of history, with New Dealers and the public losing confidence in "industrial self-government," with politicians and students of industrial structure disturbed by "the concentration

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1 *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933).

2 *Id.* at 359-60.

3 *Id.* at 374.

of economic power," the Court condemned as unlawful a cooperative gasoline-buying program by the leading oil companies designed to raise and stabilize gasoline prices by insuring an orderly marketing of "distress" gasoline[4]—an experiment that had won the unofficial blessing of NRA administrators at the time it was inaugurated. While any competent law student might differentiate these two cases on the basis of their facts, the opinions reflect less the logic of the law than the temper of the times.

Judges, like other people, cannot dissociate themselves from the institutional matrix in which they have their being. This sociological principle is illustrated by a line of decisions handed down by the Supreme Court during the next decade. The climate of public opinion in which these decisions were formulated had its origin during the post-NRA and early World War II years. It was characterized by an increasing fear of industrial concentration. Berle and Means in 1932 had dramatized the extent of and trends toward industrial concentration in this country in their provocative and discerning analysis of *The Modern Corporation and Private Property.* They found that the 200 largest nonfinancial corporations, representing less than one-tenth of 1 per cent of all nonfinancial corporations, controlled approximately 50 per cent of all corporate wealth in the United States, 38 per cent of all business wealth, and 22 per cent of all national wealth.[5] They found that in the period studied the percentage of corporate wealth owned by the 200 largest corporations had increased significantly, and they estimated that by 1950, at the 1909-29 rate of increase, the 200 largest corporations would own more than 70 per cent of all corporate wealth; at the more rapid rate of increase of the six years ending in 1929, the 200 largest corporations would own 85 per cent of all corporate assets by 1950.[6]

The New Deal, which initially made economic planning a governmental responsibility, had at the same time nourished suspicion if not hostility toward big business. The New Deal's failure through political management to solve the problems of unemployment and to raise national income to economical levels ultimately raised doubts

4 *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

5 Berle and Means, The Modern Corporation and Private Property 32 (1932).

6 *Id.* at 40.

among its leaders about the adequacy of centralized controls to make an economic system work. President Roosevelt, in campaigning for re-election in 1936, had noted the improved economic outlook by boasting, "We planned it that way." Only two years later, after the economic setback of 1937-1938, in recommending to Congress the authorization of the Temporary National Economic Committee, Roosevelt expressed his skepticism of centralized control of industry in these words:

> Private enterprise is ceasing to be free enterprise and is becoming a cluster of private collectivisms;
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> . . . .
>
> No one suggests that we return to the hand loom or hand forge. . . . But modern efficient mass production is not furthered by a central control which destroys competition between industrial plants each capable of efficient mass production while operating as separate units.
>
> . . . .
>
> The power of a few to manage the economic life of the Nation must be diffused among the many or be transferred to the public and its democratically responsible government.[7]

But to the President governmental control was not an attractive alternative. About it he said:

> Those people, in and out of the halls of government, who encourage the growing restriction of competition either by active efforts or by passive resistance to sincere attempts to change the trend, are shouldering a terrific responsibility. Consciously or unconsciously they are . . . either working for control of the Government itself by business and finance or . . . a growing concentration of public power in the Government. . . .[8]

As a first step in coping with what he regarded as a dangerous concentration of economic power, the President proposed to establish a temporary national economic committee to investigate its extent and causes and to propose remedies. The TNEC, whose investi-

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7 *Message from the President of the United States*, S. Doc. No. 173, 75th Cong., 3d Sess. 3, 6 (1938).

8 *Id.* at 6.

gations extended over a three-year period, reflected not merely Presidential but a national concern about the decline of competition. Congress appropriated $1,070,000 for its activities and voted larger appropriations for the Antitrust Division of the Department of Justice. Under Thurman Arnold's leadership the division undertook its most aggressive campaign against conspiracies, combinations in restraint of trade, and unlawful monopolies.

Oligopoly in Theory and in Antitrust

Meanwhile economic theory had laid a logical basis for political concern about the concentration of economic power. According to the teachings of neoclassical theory a competitive industrial structure insures an economical allocation of resources and a distribution of income in accordance with the principle of marginal productivity. The forces of a free market—Adam Smith's "invisible hand"—economists had said would harness the selfish interests of businessmen and so guide them as to promote the public welfare. But the theory of monopolistic or imperfect competition as presented in this country by Edward Chamberlin[9] and by Joan Robinson[10] in the early 1930's challenged the adequacy of market forces to protect the public welfare in industries where sellers are few and products standardized. Chamberlin in his discussion of oligopolistic pricing concluded on a basis of his rigid assumptions that if informed and rational oligopolists take account of the indirect as well as the direct consequences of their decisions, they will without conspiring behave like monopolists.[11] Other things equal, in oligopolistic markets consumers will pay more and get less than under competition. This disquieting conclusion and the doctrine that supported it quickly got into the textbooks and eventually had an impact on the law.

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[9] The Theory of Monopolistic Competition (1933).

[10] The Economics of Imperfect Competition (1933).

[11] Chamberlin in recent years has protested against the identification of oligopoly theory with "the" monopoly solution, saying this is only one among other possible solutions and that the theory "yields no certain conclusion as to what will happen, given the bare minimum of information that the number of sellers is small." *Une Formulation Nouvelle de la Théorie de la Concurrence Monopolistique*, in Economie Appliquée, Archives de L'Institut de Science Economique Appliquée, V. (1952), 192, quoted in Arant, *Competition of the Few Among the Many*, 70 Q. J. Econ. 327, 343 (1956).

The leading cases that reflect the widespread fear of industrial concentration and monopoly during this era are *United States* v. *Aluminum Company of America*[12] and *American Tobacco Company* v. *United States.*[13] Judge Learned Hand, in deciding that Alcoa possessed an unlawful monopoly, rejected the defenses which more recent decisions have found alluring. He was unimpressed by the fact that substitutes might serve as a check on Alcoa's power to exploit the market. "There are indeed limits to [a monopolist's] power; substitutes are available for almost all commodities, and to raise the price enough is to evoke them." [14] He found unconvincing the argument that imports, actual and potential, insured adequate consumer protection.

> It is entirely consistent with the evidence that it was the threat of greater foreign imports which kept "Alcoa's" prices where they were, and prevented it from exploiting its advantage as sole domestic producer; indeed, it is hard to resist the conclusion that potential imports did put a "ceiling" upon those prices. Nevertheless, within the limits afforded by the tariff and the cost of transportation, "Alcoa" was free to raise its prices as it chose, since it was free from domestic competition, save as it drew other metals into the market as substitutes.[15]

Judge Hand rejected good performance as a justification for monopoly under the Sherman Act. As he put it, "it is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit." [16] He rejected the doctrine of specific intent as essential to a finding of monopoly. Monopolists ordinarily are not sleepwalkers; they know where they are going. Unless they have monopoly thrust upon them, they have monopolized within the meaning of section 2 of the Sherman Act. Judge Hand brought section 2 of the act into harmony with section 1 by recognizing that "the vice of the restrictive contracts

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12 148 F. 2d 416 (2d Cir. 1945), *new petitions considered,* 91 F. Supp. 333 (S. D. N. Y. 1950).

13 328 U. S. 781 (1946).

14 *United States* v. *Aluminum Co.*, 148 F. 2d 416, 425-26 (2d Cir. 1945).

15 *Id.* at 426.

16 *Id.* at 427.

and of monopoly is really one, it is the denial to commerce of the supposed protection of competition";[17] and he promulgated the doctrine that it was the existence of monopoly, when achieved by deliberate business policies, not the abuse of monopoly, that the law forbade. Rejecting the rule of reason of the 1911 *Standard Oil* and *American Tobacco* cases,[18] he declared that Congress "did not condone 'good trusts' and condemn 'bad' ones; it forbade all." [19]

The *Aluminum* decision was a vigorous affirmation of the public's distrust of the concentration of economic power as such; but it was the second *American Tobacco* decision that in addition to reflecting community hostility toward industrial concentration seemed to bring the law on monopoly into harmony with the Chamberlinian doctrine of oligopolistic pricing. A federal jury had convicted the "Big Three" cigarette makers—the American Tobacco Company, Liggett & Myers Tobacco Company, and R. J. Reynolds Tobacco Company—of having violated sections 1 and 2 of the Sherman Act. The issue on appeal to the Supreme Court was the meaning of "monopolize" as used in section 2 of the Act. In reviewing the evidence the Court was impressed by the combined size of the defendants. Together they had continuously accounted for more than 68 per cent and usually for more than 75 per cent of the national production of cigarettes. In the production of burley blend cigarettes their dominance was even more marked. Clearly the defendants had earned "the title of the 'Big Three.' . . . the smallest of them at all times showed over twice the production of the largest outsider. . . . [C]omparative size on this great scale inevitably increased the power of these three to dominate all phases of their industry." [20] Quoting *United States* v. *Swift & Company* the Court said, " 'Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.' " [21]

Nor was the size of the Big Three reflected solely in production figures. Their combined net worth had risen from $277,000,000 in

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17 *Id.* at 428.

18 *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U. S. 106 (1911).

19 *United States* v. *Aluminum Co.*, 148 F. 2d 416, 427 (2d Cir. 1945).

20 *American Tobacco Co.* v. *United States*, 328 U. S. 781, 796 (1946). Statements of fact about the tobacco companies are taken from the opinion.

21 286 U. S. 106, 116 (1932), quoted *ibid.*

1912 to over $551,000,000 in 1939. In each of the years 1937, 1938, and 1939 American, Liggett & Myers, and Reynolds had together spent over $40,000,000 for advertising. Tremendous expenditures for advertising and the large sums required for inventories and federal taxes tended to prevent the rise of potential competition. The power of the Big Three was reflected in buying tobacco as well as in selling cigarettes. Together they bought from 50 to 80 per cent of the domestic flue-cured tobacco, and in the burley belt of Kentucky and Tennessee their percentage of total purchases was even larger. The record produced no evidence of a written agreement among the defendants, but it indicated that in both buying tobacco and selling cigarettes they followed a common course of action. They all paid the same price for their preferred tobacco grades, and each adjusted its cigarette prices to that of the price leader's price. When, after having raised cigarette prices while the prices of raw tobacco were steadily declining, they lost ground to the so-called economy brand cigarettes, they began a tobacco-buying program that forced up the price of cheaper tobacco used in economy brands, and they cut the price of their own standard brand cigarettes. The Supreme Court concluded that the Big Three had both the power to exclude competitors and the power to control prices, and it confirmed the jury's finding of a criminal conspiracy to monopolize the sale of cigarettes.

Because the Court recognized a common course of action as sufficient evidence of conspiracy, some discriminating students of the law concluded that the Court had brought the law on monopoly into harmony with the theory of oligopolistic pricing. On the significance of the *Tobacco* decision Eugene V. Rostow, a distinguished professor of law, trained also in economics, concluded:

> When three companies produce so large a percentage of market supply, that fact alone is almost sufficient evidence that the statute is violated. Ruthless and predatory behavior need not be shown. The actual elimination of small competitors is unnecessary. . . . Parallel action, price leadership, a reliance on advertising rather than price competition as a means of inducing changes in each seller's share of the market, and, above all, size—the market advantage of a small number of large sellers or buyers—these are now key points to be proved in

> a case of monopoly, or of combination in restraint of trade. . . . Painstaking search for scraps of evidence with a conspiratorial atmosphere are [*sic*] no longer necessary. . . . [D]ecisive elements are the power to assert a degree of control over price and output *in the market as a whole*. . . .[22]

An equally discerning economist, William H. Nicholls, saw the *Tobacco* decision as

> a legal milestone in the social control of oligopoly. By permitting the inference of illegal conspiracy from detailed similarity of behavior and by shifting attention from the abuse of power to its mere existence (as indicated by degree of market control), the courts have at last brought oligopolistic industries within reach of successful prosecution under the antitrust laws.[23]

The Federal Trade Commission and Oligopoly

While judges and economists, both influenced by and influencing the temper of the times, were thus beginning to conceive the monopoly problem in similar terms, administrators, too, reflected prevailing skepticism about the compatibility of a market of few sellers with effective competition. During the late 1930's and early 1940's the Federal Trade Commission inaugurated a number of proceedings against associated activities by trade rivals designed to lessen the severity of competition among themselves.[24] Frequently the evidence of conspiracy was circumstantial. Business rivals followed common patterns of behavior without written agreements to

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[22] Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. Chi. L. Rev. 567, 585 (1947). (Emphasis added.)

[23] Nicholls, *The Tobacco Case of 1946*, 39 Am. Econ. Rev. 284, 296 (1949).

[24] *Crown Mfrs. Ass'n*, 45 F. T. C. 89 (1948), *aff'd*, 176 F. 2d 974 (4th Cir. 1949); *Rigid Steel Conduit Ass'n*, 38 F. T. C. 534 (1944), *aff'd sub nom. Triangle Conduit & Cable Co.* v. *FTC*, 168 F. 2d 175 (7th Cir. 1948), *aff'd per curiam sub nom. Clayton Mark & Co.* v. *FTC*, 336 U. S. 956 (1949); *National Crepe Paper Ass'n*, 38 F. T. C. 282 (1944), *aff'd sub nom. Ft. Howard Paper Co.* v. *FTC*, 156 F. 2d 899 (7th Cir. 1946); *Milk and Ice Cream Can Institute*, 37 F. T. C. 419 (1943), *aff'd*, 152 F. 2d 478 (7th Cir. 1946); *Cement Institute*, 37 F. T. C. 87 (1943), *order set aside*, 157 F. 2d 533 (7th Cir. 1946), *rev'd*, 333 U. S. 683 (1948); *United States Maltsters Ass'n*, 35 F. T. C. 797 (1942), *modified*, 37 F. T. C. 342 (1943), *aff'd*, 152 F. 2d 161 (7th Cir. 1945); *Salt Producers Ass'n*, 34 F. T. C. 38 (1941), *modified and aff'd*, 134 F. 2d 354 (7th Cir. 1943).

do so and sometimes without a well-defined mechanism for insuring that they would. A common experience with the untoward consequences of price cutting where sellers were few contributed to behavior patterns calculated to insure identical pricing at stabilized levels. The Federal Trade Commission sought to ban such vaguely defined collective action among trade rivals, which it regarded as not consistent with effective competition, by broad and similarly vaguely defined orders.

In 1941 the Commission found that the market analysis and business counselling program of the Salt Producers Association not only had a dangerous tendency to hinder competition but had prevented effective competition in selling salt.[25] It accordingly ordered association members to cease and desist from "entering into, continuing, or carrying out, or directing, instigating, or cooperating in, any *common course of action,* mutual agreement, combination, or conspiracy, to fix or maintain the prices of salt" or regulate its production.[26] On appeal by respondents and objection to the Commission's banning a "common course of action" by the salt producers, the appellate court modified the Commission's order to prohibit "any *planned* common course of action" by the defendants with respect to the matters specified in the Commission's orders.[27] Similarly in the *Cement Institute* case[28] the Commission ordered the respondents to refrain from any "planned common course of action" to sell cement according to the multiple basing point delivered-price system or to follow the practices with which the industry had implemented it. In the *Rigid Steel Conduit* case[29] the Commission developed further its doctrine of implied conspiracy or conscious parallelism of action. It charged that the makers of rigid steel conduit had conspired to use the basing point system, that each respondent had used it knowing that his rivals did so, and that

[25] *Salt Producers Ass'n,* 34 F. T. C. 38 (1941), *modified and aff'd,* 134 F. 2d 354 (7th Cir. 1943).

[26] *Id.* at 55. (Emphasis added.)

[27] *Salt Producers Ass'n* v. *FTC,* 134 F. 2d 354, 357 (7th Cir. 1943). (Emphasis added.)

[28] *Cement Institute,* 37 F. T. C. 87, 260 (1943), *aff'd,* 333 U. S. 683 (1948).

[29] *Rigid Steel Conduit Ass'n,* 38 F. T. C. 534 (1944), *aff'd sub nom. Triangle Conduit & Cable Co.* v. *FTC,* 168 F. 2d 175 (7th Cir. 1948), *aff'd per curiam sub nom. Clayton Mark & Co.* v. *FTC,* 336 U. S. 956 (1949).

such practices "have a dangerous tendency to, and have actually, hindered . . . and prevented competition in price in the sale of 'conduit.' "[30] The Commission not only ordered the respondents to quit conspiring or following a "planned common course of action," but ordered each respondent individually to quit quoting or selling rigid steel conduit at prices calculated on a basing point system "for the purpose or with the effect of systematically matching delivered-price quotations. . . ."[31]

The Federal Trade Commission, whether deliberately or not, was thus bringing its findings and orders into closer accord with the theory of oligopolistic pricing. It aimed at banning monopolistic behavior that apparently resulted from sellers' recognition of their mutual interdependence in markets where they were few in number.

Although these decisions brought legal doctrine somewhat closer to contemporary economic logic, they did not solve the basic problem with which the judges and administrators were concerned: how to make competition effective in markets of few sellers. The decisions banned the monopolistic practices but left unmodified the structure of industry which may have shaped practices. If the pricing practices of American Tobacco, Reynolds, and Liggett & Myers were consistent with independent nonconspiratorial decision-making in a market dominated by three companies; if a price cut by one necessarily engendered a price cut by all without any significant redistribution of or increase in the sale of cigarettes; if the business interests of each were served by following a price increase inaugurated by any one—price leadership was almost an inevitable business practice, and the finding of criminal conspiracy followed by nominal fines was mild punishment, not a basic remedy. Moreover, it left the executives of the several tobacco companies puzzled and disturbed —puzzled because they did not know just how to protect their separate business interests without following common pricing policies, disturbed by a realization that if they did so they would again run afoul of the law.[32] Conspiracy, they feared, was being identified

[30] 38 F. T. C. at 550.

[31] *Id.* at 595.

[32] Counsel for Liggett & Myers expressed the dilemma the "Big Three" faced: "[P]resumably, the appellants were convicted of agreement, not of the particular operations alleged to constitute agreement. Yet, on the Government's theory, continuation by more than one of the appellants of the operations alleged is evidence of a

with sound business practice. Nor was uneasiness confined to tobacco executives. When the Supreme Court sustained the Federal Trade Commission's finding that basing point pricing as practiced in the cement industry was unlawful, the chairman of the board of directors of the United States Steel Corporation announced that businessmen must educate the Court or persuade Congress to change the law.[33]

The Concept of Workable Competition

Meanwhile the economists had become concerned about the political implications of the Chamberlinian logic. If, as Arthur R. Burns[34] and other economists contended, it was the businessman's search for the economies of mass production that had shaped the structure of the contemporary economy, a rigorous enforcement of the antitrust statutes designed to insure competitive pricing could be had only at the expense of industrial efficiency. Burns believed this, but he did not believe that the nation could rely on oligopolistic markets to insure an economical allocation of resources and an equitable distribution of income; and he proposed a system of governmental controls so comprehensive that one of his critics characterized his book as "planning for totalitarian monopoly." [35] Socialists saw in industrial concentration an inevitable trend that would eventually necessitate a choice between private monopoly and the nationalization of industry.

This institutional drift was the occasion for, if not the cause of, a re-examination of the Chamberlinian logic and the implications of industrial structure to public policy. John M. Clark, a pioneer in the new thinking, in 1939 read his now famous paper on the concept of workable competition before the American Economic

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further Sherman Act agreement. . . . If this is so, how is Liggett & Myers to carry on? . . . Is everything that appellants do illegal, or evidence of illegality, if done by more than one of them?" Brief for Liggett & Myers, p. 27, *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946).

[33] Irving S. Olds anticipated success in trying to educate the justices or to revise the statute. "I can't believe," he said, "that the country is going to let industry be disrupted by a theory that was developed many years ago by a Princeton professor." New York Journal of Commerce, April 28, 1948, p. 1. The reference is to the late Professor Frank A. Fetter.

[34] The Decline of Competition cc. 11-12 (1936).

[35] Fetter, *Planning for Totalitarian Monopoly*, 45 J. Pol. Econ. 95 (1937).

Association.[36] Clark, like Chamberlin, recognized that pure or perfect competition was an abstraction, a theoretical ideal realized in few if any markets. The actual markets of contemporary industry were compounded of elements of competition and monopoly, only some of which were controllable. To rid a market of some oligopolistic elements without ridding it of all might do more harm than good; and since all were not subject to control, controllable factors if left alone might exert a constructive influence. Clark conceived workable competition to be the best attainable functioning of markets under existing institutional arrangements, and he thought that it was good enough. Substitutes and potential competition, he argued, tended to insure consumers adequate protection from oligopolistic exploitation; rivalry among firms producing differentiated products might insure them a variety of alternatives at reasonable prices.

Clark's ideas on the significance of industrial structure to economic behavior were projected in a fertile economic and social environment, and his concept of workable competition has proved quite as revolutionary to economic thinking and economic policy as Chamberlin's earlier work. The environment that has nourished Clark's ideas is the environment with which all students of contemporary affairs are familiar. World War II inaugurated a prolonged period of deficit financing. The war was a total war, demanding the utmost endeavor of all nationals, civilian and combatant alike. It put a part-time American industry on an overtime basis. It eliminated unemployment. It raised price levels and the national income. By converting a buyers' into a sellers' market it made goods easy to sell and hard to get. It brought a business boom only temporarily interrupted by the cessation of hostilities. The postwar period found a pent-up demand for goods previously in shortage and an accumulated purchasing power with which to buy them. The cold war sustained a prosperity engendered by the hot one. It brought a prolonged expansion in gross national product and national income. It brought a level of employment earlier conceived as an admirable but remote ideal. It brought a stock market rise, lacking perhaps in the dramatic qualities of the 1928-1929 boom

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[36] *Toward a Concept of Workable Competition*, 30 Am. Econ. Rev. 241 (1940), reprinted in American Economic Ass'n, Readings in the Social Control of Industry 452 (1942).

but equally persistent in its upward pressure on the prices of stocks of America's leading corporations. It revived the confidence of businessmen in a private enterprise economy and brought a tremendous expansion in industrial facilities financed in large part out of current earnings. It developed an entrepreneurial interest in industrial research hitherto lacking. In short, it brought to this country a level of material welfare and abundance that excited the admiration and envy of the rest of the world. And the business executives were not slow to claim credit for it. Through a spate of institutional advertising they identified corporate welfare with national welfare, economic prosperity with business efficiency, competition with private enterprise. The American economic system worked; competition must therefore have been workable.

Small wonder that businessmen, economists, administrators, and the courts have accepted the logic of the concept of workable competition with its reassuring political and economic implications, while rejecting the Chamberlinian logic at once pessimistic and disturbing. Economists, administrators, and judges are alike in their desire to make peace with their environment. Thus the concept of workable competition is on its way to becoming a standard in antitrust proceedings.

As the concept has gained general acceptance it has undergone clarification and modification. Although economists might differ in their judgment as to the workability of any particular industrial arrangement, they are pretty well agreed on what to look for in reaching a judgment. While differing in the weight they would attach to the several criteria, they would look to an industry's structure, the conduct of the firms that comprise it, and to its performance. By structure is meant the way in which the industry is made up. Relevant questions are: How many sellers comprise it? What is their relative size? Is entry easy or difficult? Determining the boundary of an industry or the relevant market for its products is not easy because rivalry of substitutes may be so vigorous as to justify their inclusion in it. But having defined the boundaries of an industry, economists are pretty well agreed that the number of firms comprising it and their relative size may influence the effectiveness of competition. Where firms are few, in continuing close contact, and operating under similar conditions, other things equal,

they may—in accordance with Chamberlinian doctrine—tend to behave like monopolists even without overtly conspiring to do so. The greater the number of firms, other things equal, the greater the likelihood of their behaving like competitors.

Conduct describes the practices and strategies which firms resort to in their dealings with each other and with the market. Trade association activities designed to lessen the severity of competition, price leadership, and basing point pricing are illustrations of the sort of practices that may reflect an absence of effective competition. Do the firms possess market advantages gained through patents or otherwise which they try to protect? Does their conduct reflect the uninhibited forces of a free market or associated activities designed to control market forces? These are relevant questions in determining the significance of conduct to the competitive workability of any industrial pattern.

By performance is meant the manner in which an industry fulfills the functions which a market economy imposes on it. Relevant questions include: What is the course of prices? of profits? of cost-price relationships? of expenditures on advertising? of technological innovation? In general, does the industry reflect the dynamic forces of competitive rivalry or the dead hand of monopoly?

Before economists had precisely defined the concept, some saw in workable competition an appropriate standard by which to judge the legality of alleged antitrust violations. Clark cautiously concluded his initial essay with the hope "that [the] government need not assume the burden of doing something about every departure from the model of perfect competition." [37] Later he urged that "where impairment of competition is an issue, there should be a showing of how competition is impaired, by comparison with an identifiable concept of what would constitute unimpaired competition in an industry having the unavoidable physical and economic characteristics of the one whose practices are being adjudicated." [38] At an earlier date Mason[39] had indicated the usefulness of performance in drawing the line between socially acceptable and un-

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[37] *Id.* at 256, Readings 475.

[38] Clark, *The Orientation of Antitrust Policy,* 40 Am. Econ. Rev. 93, 98 (1950).

[39] *Monopoly in Law and Economics,* 47 Yale L. J. 34 (1937).

acceptable departures from perfect competition. Markham[40] later defined workable competition in terms of alternatives. According to Markham, when account is taken of its structure and the forces that shaped it, an industry is workably competitive if no change "can be effected through public policy measures that would result in greater social gains than social losses." [41] Griffin,[42] more than any other economist, has emphasized performance as a test of workable competition, and in applying the test he would take account of political as well as economic benefits.

The Lawyers and Workable Competition

Although economists have developed a logic that some think may be of use in antitrust proceedings, it is the lawyers who have been the most unrestrained in urging that the concept of workable competition be utilized as a practical standard in the adjudication of antitrust cases. The most articulate and vigorous of these are S. Chesterfield Oppenheim and Blackwell Smith. Blackwell Smith in an article on *Effective Competition: Hypothesis for Modernizing the Antitrust Laws,*[43] published in 1951, proposed twelve criteria[44] for determining good industrial performance, all of them somewhat vague and difficult to apply. He advocated their application under a rule of reason in determining the legality of alleged violations of

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40 *An Alternative Approach to the Concept of Workable Competition,* 40 Am. Econ. Rev. 349 (1950).

41 *Id.* at 361.

42 An Economic Approach to Antitrust Problems, American Enterprise Association, xiii (1951); *Needed: A Realistic Antitrust Policy,* Harv. Bus. Rev., Nov.-Dec. 1956, p. 76.

43 26 N. Y. U. L. Rev. 405.

44 "*Procedure Under the Rule of Reason.* In determining whether any commercial practices or courses of conduct promote Effective Competition or are unreasonably injurious thereto, all relevant circumstances shall be considered, including such actual or probable results of the conduct, under like circumstances in the market, as the increase or decrease of: (1) Alternatives available to customers or sellers; (2) Volume of production or services; (3) Quality of the services or goods; (4) Number of people benefited; (5) Incentives to entrepreneurs; (6) Efficiency and economy in manufacturing or distribution; (7) The welfare of employees; (8) The tendency to progress in technical development; (9) Prices to customers; (10) Conditions favorable to the public interest in defending the country from aggression; (11) The tendency to conserve the country's natural resources; (12) Benefits to the public interest assuming the relief requested by the government in the proceedings." *Id.* at 441.

the antitrust statutes. The Business Advisory Committee of the Department of Commerce, accepting Smith's ideas virtually unchanged, in 1952 recommended drastic modifications in administrative standards and procedures under the antitrust statutes.[45] The recommended changes were designed to adjust the law to industrial structure and business practice rather than to make industrial structure and business practice conform to the law. The council identified the performance of the national economy with the performance of big firms and lamented a tendency to confuse bigness with monopoly. To temper the administration of the antitrust laws, the council recommended the creation of a review board consisting of businessmen, engineers, economists, and lawyers to pass on governmental proposals to investigate or proceed against alleged antitrust violations.

Oppenheim, in a more elaborate analysis of trends in the administration of the antitrust statutes,[46] like Smith, saw a need to bring antitrust laws into harmony with the facts of industrial life. Like Smith he vigorously advocated the utilization of the concept of workable competition under a rule of reason in administering the statutes. Like Smith he lamented tendencies in court and administrative decisions to outlaw per se certain business practices which on their face might suggest noncompetitive behavior or monopoly power, without first making a detailed analysis of their economic implications in the light of the whole industrial pattern in which they had developed. Like Smith he emphasized the importance of performance in determining the social acceptability of industrial patterns and structures, and like Smith he seemed to believe in a broad social rather than a narrow economic test of performance. Oppenheim's ideas also caught the attention of administrators and, largely in response to his pleas for new standards in antitrust administration, the Attorney General in 1953 created a national committee to study the antitrust laws[47] and appointed Oppenheim and Judge Barnes, Assistant Attorney General in charge of antitrust, as co-chairmen.

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[45] U. S. Dep't of Commerce, Effective Competition: A Report to the Secretary of Commerce by His Business Advisory Council (1952).

[46] *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy,* 50 Mich. L. Rev. 1139 (1952).

[47] The Committee's report appeared on March 31, 1955. Report of the Attorney General's National Committee To Study the Antitrust Laws (1955).

Although it might reasonably have been expected from the committee's make-up and from the forces that created it that the committee would recommend an amendment to the antitrust laws to provide for their administration in accordance with the concept of workable competition under a rule of reason, actually the committee specifically rejected such standards. But there is evidence that the committee tried to achieve by indirection what it did not openly advocate. Smith, a committee member, has revealed something of the committee's internal conflict on the issue of workable competition. The academic economists were skeptical, but their skepticism was matched by the determination of the "real-life practitioners." [48] The give and take of democratic discussion "did much to reduce the disparity among groups." [49] Smith concluded that out of the committee's deliberations has come

> the most realistic set of standards for legal and socially acceptable competition since the Business Advisory Council Report on Effective Competition published by Secretary of Commerce Sawyer. The present report makes more official a great deal of what was then and there recommended.[50]

In preference to making basic recommendations for a revision of antitrust policy and standards the committee chose to analyze the decisions of administrative agencies and the opinions of the courts in their interpretation and application of the antitrust statutes, and it sought thereby to shape policy by providing "future guides to enforcement agencies, Congress, and the courts." [51] In its analysis and evaluation the committee commended the courts and administrative agencies when they apparently looked to all economic factors in trying to determine the significance to public welfare of the arrangements complained against, and it criticized decisions that condemned business practices in and of themselves without an examination of their full economic implications in their industrial setting. In evaluating the committee's report Smith has said:

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[48] Smith, *Antitrust Report To Narrow Gap Between Law and Economics*, Trade Practice Bulletin, May 1955, p. 4.

[49] *Ibid.*

[50] *Ibid.*

[51] Report of the Attorney General's National Committee To Study the Antitrust Laws 3 (1955).

> [The report] should be a bench mark for a long time to come against which to make comparisons of decisions, administrative actions, and legislation to see how far they drift from true readings.[52]

To insure that the courts might have at hand the committee's report as a ready guide, copies were sent to all federal judges. Oppenheim has since expressed the opinion that "the report is commanding the respect and serious consideration of the bar and Government officials." [53] Thurman Arnold, former Assistant Attorney General in charge of antitrust, has corroborated this opinion in testimony before a congressional committee, saying, "[T]he effect of the report is unquestionably very significant when you are arguing a case in court. . . . After all, a large committee of supposedly expert people will inevitably have an effect upon the courts." [54]

Workable Competition in Antitrust Decisions

As previously suggested, without benefit of the committee's work the courts were already manifesting a disposition to judge alleged violations of the Sherman Act by the concept of workable competition. Smith noted this in saying,

> Legal opinions and decisions have been based progressively more and more on the concepts of effective competition. The outstanding opinion was that of Judge Knox in the Aluminum case where full play was given to the tests of effective competition, including inter-industry competition, and increasing ability of competitors to cope with the erstwhile dominant concern. Then Judge Wyzanski in the Shoe Machinery case, Mr. Justice Reed in the Columbia Steel case, and Judge Leahy in the Dupont Cellophane case have further elaborated these standards.[55]

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[52] Smith, *supra* note 48, at 1.

[53] Letter dated August 1, 1955, to an unidentified addressee, *Hearings on Price Discrimination before House Select Committee on Small Business*, 84th Cong., 1st Sess. 194 (1955).

[54] *Id.* at 5, 6.

[55] Smith, *supra* note 48, at 4.

In analyzing the effect on these or other important antitrust decisions of the economists' concept of workable competition, it is important to remember that the concept is vague, economists are not agreed on the relative importance of structure, conduct, and performance in evaluating the workability of any particular market situation, and the judgments of both economists and jurists are influenced not only by their own preconceptions but especially by attitudes currently prevailing on the significance of big business. With such wide discretion as the application of the concept necessarily involves, decisions are likely to give approval to business arrangements acceptable to the general culture within which they have developed.

The National Lead Case

In this case the government charged that the two major producers of titanium compounds in the United States, the National Lead Company and E. I. du Pont de Nemours & Company, had conspired and combined to restrain and monopolize trade in titanium in violation of sections 1 and 2 of the Sherman Act. The evidence established that National Lead together with du Pont and the leading foreign producers of titanium through a series of patent exchange agreements and intercorporate arrangements had cartelized world trade in titanium. About these arrangements the district court said:

> In detail, the elapsed quarter century is crowded with negotiations, conferences, correspondence and agreements. The men who participated in these were all articulate, literate and . . . recorded what they saw, heard, said and thought with Boswellian fidelity. When the story is seen as a whole, there is no blinking the fact that there is no free commerce in titanium. Every pound of it is trammelled by privately imposed regulation. The channels of this commerce have not been formed by the winds and currents of competition. They are, in large measure, artificial canals privately constructed. The borders of the private domain in titanium are guarded by hundreds of patents, procured without opposition, and maintained without litigation. The accumulated power of this private empire, at the outbreak of World War II, was tremendous. It was more difficult for the independent outsider to enter this business than for the

> camel to make its proverbial passage through the eye of a needle.[56]

In the United States, du Pont, National Lead, and two small producers, American Zirconium Corporation and Virginia Chemical Corporation, controlled titanium production—and each of the small producers was tied to National Lead or du Pont through corporate ties and patent licensing agreements. The Supreme Court upheld the district court's finding that the arrangements by which titanium producers had cartelized the trade in titanium would tend to violate both sections 1 and 2 of the Sherman Act, and it upheld the district court's injunction against a continuance or revival of such agreements.[57] But the Court denied the Government's request that National Lead and du Pont each be required to dispose of one of its two titanium plants, thereby increasing the number of firms from four to six. In rejecting divestiture the Court apparently attached greater weight to the industry's performance than to its structure in determining the effectiveness or workability of competition in the industry. The Court concluded:

> There is no showing that four major competing units would be preferable to two, or, including American Zirconium and Virginia Chemical, that six would be better than four. Likewise, there is no showing of the necessity for this divestiture of plants or its practicality and fairness.[58]

The district court had found that "during the regime of the combination, the art has rapidly advanced, production has increased enormously and prices have sharply declined." [59] Fine performance of course did not justify unlawful conduct, and the Supreme Court did not hesitate to affirm an injunction against the various restrictive agreements by which titanium producers had divided world markets. It apparently believed that the industry, regardless of its structure, if rid of restrictive agreements would prove workably competitive.

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56 *United States* v. *National Lead Co.*, 63 F. Supp. 513, 521 (S. D. N. Y. 1945).

57 *United States* v. *National Lead Co.*, 332 U. S. 319 (1947).

58 *Id.* at 352.

59 63 F. Supp. at 525.

The 1950 Aluminum Decision

Judge Hand in finding that the Aluminum Company of America was an unlawful monopoly decided that nothing should be done to disturb its industrial structure pending the outcome of the Government's disposal of surplus aluminum plants. At the close of the war the Government owned most of the capacity for producing aluminum, and it had been directed under the Surplus Property Act of 1944[60] to dispose of its vast properties in this and other industries so as "to give maximum aid in the reestablishment of a peacetime economy of free independent private enterprise, . . . to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns . . . [and] to foster the development of new independent enterprise . . . without fostering monopoly or restraint of trade. . . ."[61] From the Government's disposal program Kaiser Aluminum and Chemical Corporation and Reynolds Metals Company emerged as full-fledged large-scale integrated companies with facilities acquired at only a fraction of their original cost. Accordingly in March, 1947, Alcoa petitioned the District Court for the Southern District of New York to declare that it no longer had a monopoly of the ingot market. The Government filed a counterpetition alleging that competition had not been established in the aluminum industry, that Alcoa continued to dominate and control the aluminum ingot market, and that only by divestiture of certain of its plants and properties could competition be established. The Government requested the establishment of an additional fully integrated producer in the industry.

On June 2, 1950, Judge Knox handed down a carefully reasoned opinion running through eighty printed pages.[62] At the outset he observed that "notwithstanding the antiquity of the action, the issues involved must be determined in accordance with the more recently established anti-trust principles, and not by those that were well recognized in an earlier day."[63] Just as the relevant legal principles had changed in the unfolding of the law, so had the relevant economic principles. Judge Knox noted that "the precise ingredients

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60 58 Stat. 765

61 *Id.* at 766.

62 *United States* v. *Aluminum Co.*, 91 F. Supp. 333 (S. D. N. Y. 1950).

63 *Id.* at 339.

of 'effective competition' cannot be said to have been a static concept under the Sherman Act. Their applications, as well as their implications, have varied with changes in judicial thought with respect to economic and legal philosophies." [64] But Judge Knox lamented that "recent precedents . . . have fallen short of definite specifications as to the requirements of 'effective competition.' " [65] Nevertheless he was hopeful that it would be "possible to formulate a more or less concrete delineation of the standards that should be met in seeking a just decision upon the complicated facts of this case." [66]

To determine "the extent of permissible power that is consistent with the anti-trust laws in a particular industry" [67] Judge Knox applied a broad conception of the principle of workable competition, in which performance plays a relatively important role. He enunciated the following factors as relevant: "the number and strength of the firms in the market; their effective size from the standpoint of technological development, and from the standpoint of competition with substitute materials and foreign trade; national security interests in the maintenance of strong productive facilities, and maximum scientific research and development; together with the public interest in lowered costs and uninterrupted production." [68] To Judge Knox the industry's structure, although not to be ignored, was relatively unimportant to the effectiveness of competition. "Commercial competition . . . is the independent endeavour of *two* or more persons or organizations within the realm of a chosen market place, to obtain the business patronage of others by means of various appeals, including the offer of more attractive terms or superior merchandise." [69]

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[64] *Id.* at 340.

[65] *Ibid.*

[66] *Ibid.*

[67] *Id.* at 347.

[68] *Ibid.*

[69] *Id.* at 355. (Emphasis added.) Compare Judge Knox's conception with that of J. M. Clark. Clark said: "Competition is rivalry in selling goods, in which each selling unit normally seeks maximum net revenue, under conditions such that the price or prices each seller can charge are effectively limited by free option of the buyer to buy from a rival seller or sellers of what we think of as 'the same' product, necessitating an effort by each seller to equal or exceed the attractiveness of the others'

Judge Knox did not find in recent precedents a precise specification for effective competition, but he did find a precise conception of monopoly. Monopoly is the power to fix prices and the power to exclude rivals from the market. Investigating these two determinants of power, Judge Knox quickly disposed of the Government's contention that Alcoa's monopolistic power was manifested in its control over the price of aluminum pig and ingots. As the only producer selling these in substantial quantities to fabricators, Alcoa had "prime responsibility for prices." [70] However, the potential competition of Reynolds and Kaiser (who elected to fabricate virtually all the ingots and pig they produced) effectively limited Alcoa's power over prices. "The Government has not demonstrated that Alcoa enjoys price leadership with regard to fabricated products, a matter which would have to be included if a true representation of the industry were sought." [71] Accordingly Judge Knox held that "price domination on the part of Alcoa has not been established. . . ." [72]

Judge Knox examined more thoroughly the issue of Alcoa's power to exclude rivals from the market. He reviewed meticulously the physical resources of both Kaiser and Reynolds at the several stages of production, their comparative costs, financial resources, and control of patents. In all respects he found that Alcoa had a substantial advantage over either of its rivals. Alcoa's financial strength enabled it to take advantage of trade opportunities and to stifle Kaiser's and Reynolds' growth whenever it wished. The evidence before it, the court said, was insufficient to assure that in the future competitive conditions of an "effective and lawful nature" [73] would prevail in the aluminum industry. But the court did not find in Alcoa's recent behavior an intent to monopolize, and it could not bring itself to disturb the organization of Alcoa's physical properties. A "strong and resourceful domestic aluminum industry" *was* essential to "national security" and "the peacetime welfare of

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offerings to a sufficient number of buyers to accomplish the end in view." *Toward a Concept of Workable Competition,* 30 Am. Econ. Rev. 241, 243 (1940), reprinted in American Economics Ass'n, Readings in the Social Control of Industry 452, 455 (1942).

[70] *United States* v. *Aluminum Co.*, 91 F. Supp. 333, 365 (S. D. N. Y. 1950).

[71] *Ibid.*

[72] *Ibid.*

[73] *Id.* at 416.

the general public." [74] The development of the industry depended upon its being composed of "financially sound and well-integrated organizations." [75] Aluminum competed with other products and had not only to hold its own against them but to enlarge its acceptance as a substitute for them. This required encroaching on the fields of "strongly entrenched" competitors, and "the weakening of any aluminum producer would lessen the buoyancy of the industry as a whole." [76] Big business is "an actuality" and if it is to meet effective competition its trade rivals must be "of somewhat comparable strength." [77] The court was unwilling "to tamper unnecessarily with economic and industrial forces from which the public has reaped substantial benefits." [78]

In thus giving its blessing to Alcoa and the industry's structure the court warned that if Alcoa should use the power which its lower production costs and its financial and physical resources gave it to injure or weaken Reynolds and Kaiser, the court would have to take another look at the matter. "If, for any reason, it should appear that their competition with Alcoa is feeble, uncertain and ineffective, appropriate action . . . will be in order." [79] The court in effect, gave official sanction to Alcoa's holding an umbrella over the industry and encouragement to a pricing policy calculated to profit the industry rather than benefit the consumer of aluminum products. Because, in responding to the temper of the times, it confused a giant firm with a dynamic industry, the court lost the opportunity it had been given by the peculiar circumstances of the *Aluminum* case to "foster independent private enterprise."

The United Shoe Machinery Case

On December 15, 1947, the Government filed a complaint against the United Shoe Machinery Corporation alleging that it was monopolizing interstate commerce in the shoe machinery industry of the United States in violation of section 2 of the Sherman Act.

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74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

78 *Ibid.*

79 *Id.* at 418.

On February 18, 1953, Judge Wyzanski of the District Court for the District of Massachusetts handed down a decision finding the corporation guilty.[80] The defendants appealed, and on May 17, 1954, the Supreme Court upheld the lower court without writing an opinion.[81] Judge Wyzanski's opinion is important for two reasons. It clarifies the doctrine laid down by Judge Hand in the *Aluminum* case that a monopoly is guilty of monopolizing if it does not have monopoly thrust upon it and it reflects a characteristic timidity of the courts in determining the remedies to be applied in antitrust cases.

Judge Wyzanski recognized three main sources of United's power in the shoe machinery market: (1) the original organization of the company in 1899, which combined the leading manufacturers of shoe machinery; (2) the superiority of its products and services; and (3) the business practices it had pursued, especially its system of leasing rather than selling shoe machinery. The original combination had brought under single control the two largest producers of shoe machinery, themselves the product of previous mergers, and a number of small but important producers.[82] In the language

[80] *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U. S. 521 (1954).

[81] In a *per curiam* statement the Court found the decree supported by the findings and the findings justified by the evidence. 347 U. S. 521 (1954).

[82] The United Shoe Machinery Co. was the subject of both criminal and civil actions under the Sherman Act, and the several court opinions give varying accounts of the number and size of the firms that made up the original combination. Justice Clarke in dissenting from the Supreme Court's 1918 opinion holding that the combination did not violate the Sherman Act undertook to give a "plain history" of the company's formation and later acquisitions, and Justice Holmes speaking for a unanimous Court in the 1913 criminal case stated the percentages of domestic production that were controlled by the larger units that made up the combination. S. W. Winslow, the controlling spirit of the Consolidated and McKay Lasting Machine Co., with 60 per cent of the country's lasting machines, and E. P. Howe, the controlling spirit of the Goodyear Shoe Machinery Co., with 30 per cent of the country's welt-sewing machines and outsole-stitching machines—both companies being the products of earlier consolidations—organized the United Shoe Machinery Co., a New Jersey corporation, in February 1899. United by an exchange of stock acquired the Goodyear and International Goodyear Shoe Machinery Cos., and in 1900 it acquired the Seaver Co., the only lasting machine manufacturer then outside the combination. United also purchased the McKay Shoe Machinery Co., which produced 70 per cent of the country's heeling machines and 80 per cent of the country's metallic fastening machines. Consolidated already owned the Davey Pegging Machine Co. Within a few weeks of its organization United acquired the only remaining strong competitor, the Eppler Welt Machine Co., and its international subsidiary. In 1901 it acquired the remaining welt machine company, the Globe. Justice Clarke quoted Winslow as

of the new corporation's president: "After the formation of the United Company it was manufacturing *every single lasting machine* that was being put out in the United States except the Seaver machine; and in 1900 we acquired the Seaver Company." [83] When Judge Wyzanski made his decision, however, the legality of the original combination was no longer in question, it having been upheld by the Supreme Court in 1918.[84]

Judge Wyzanski acknowledged the superiority of United's products and services, but he did not find that United had "achieved spectacular results at amazing rates of speed, nor has it proved that comparable research results and comparable economies of production, distribution, and service could not be achieved as well by, say, three important shoe machinery firms, as by one." [85] Moreover, the court observed,

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saying: "Immediately after the organization of the company our welting, outsole stitching and lasting machines were doing about all the welting, outsole stitching and lasting that was being done in the United States." *United States* v. *United Shoe Mach. Co.*, 247 U. S. 32, 82 (1918). On March 1, 1899, United purchased control of Goddu Co., a manufacturer of metallic fastening machines, under a contract binding the six inventors who had owned the stock to transfer to United all shoe machinery inventions they might make or acquire any interest in for a period of ten years. In 1910 United purchased for $6,000,000 the shoe machinery line that the Thomas G. Plant Co., a shoe manufacturer, had developed as a means of freeing shoe manufacturers from total dependence on United. The record showed fifty-seven purchases by United ranging from $250 for a patent application to the $6,000,000 purchase just described. Winslow and others were indicted for conspiring to restrain trade, but the Supreme Court ruled that the indictment did not charge a Sherman Act offense because the shoe machines combined were not in competition with each other (despite evidence in the record to the contrary). *United States* v. *Winslow*, 227 U. S. 202 (1913). Five years later the Supreme Court by a four-to-three vote (Justices McReynolds and Brandeis did not participate) held that the civil suit to dissolve the combination was properly dismissed for the same reason. *United States* v. *United Shoe Mach. Co.*, *supra*. It also ruled that the alleged abuses of United's leasing system were but the lawful exercise of its patent rights. By 1917 the present United Shoe Machinery Corp., organized in 1905, had merged with and become the successor of the United Shoe Machinery Co.

[83] Quoted by Justice Clarke in dissenting from *United States* v. *United Shoe Mach. Co., supra* note 82, at 81. (Emphasis added.)

[84] *United States* v. *United Shoe Mach. Co., supra* note 82. The majority opinion in finding for United summed up its views in these words: "The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used is not sustained." *Id.* at 56.

[85] *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd*, 347 U. S. 521 (1954).

> United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines.[86]

In stating the law on monopolization Judge Wyzanski elucidated the principles laid down in the *Aluminum* case, an opinion he recognized as a turning point in the interpretation of section 2 of the Sherman Act. In doing so he referred to the Supreme Court's opinions in the *Griffith*,[87] *Schine*,[88] *Paramount*,[89] and *Columbia Steel*[90] cases and noted that in the second *American Tobacco* case the Court had "expressly approved" Judge Hand's technique and language. In these cases Judge Wyzanski saw three different but related approaches: (1) "An enterprise has monopolized in violation of section 2 of the Sherman Act if it has acquired or maintained a power to exclude others as a result of using an unreasonable 'restraint of trade' in violation of section 1 of the Sherman Act." [91] (2) It has "monopolized in violation of section 2 if it (a) has the power to exclude competition, and (b) has exercised it, or has the purpose to exercise it." [92] (3) A concern that has acquired an overwhelming share of the market "monopolizes" in violation of section 2 whenever it does business, provided its monopoly is not solely the result of "superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technological efficiency (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law

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86 *Id.* at 344.

87 *United States* v. *Griffith*, 334 U. S. 100 (1948).

88 *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110 (1948).

89 *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948).

90 *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948).

91 *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd*, 347 U. S. 521 (1954).

92 *Ibid.*

(including patents on one's own inventions, or franchises granted directly to the enterprise by a public authority)." [93]

Judge Wyzanski apparently thought that the facts in the case before him satisfied each of these approaches but felt precluded from adopting the first because the Supreme Court had cleared United's lease provisions under the Sherman Act in the 1918 *Shoe Machinery* case.[94] He found it unnecessary to choose between the second and the third approaches.

> For, taken as a whole, the evidence satisfies the tests laid down in both *Griffith* and *Aluminum*. The facts show that (1) defendant has, and exercises, such overwhelming strength in the shoe machinery market that it controls that market, (2) this strength excludes some potential, and limits some actual, competition, and (3) this strength is not attributable solely to defendant's ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws.[95]

In short, a business firm monopolizes within the meaning of section 2 of the Sherman Act if it achieves or maintains market power by practices which though not predatory or illegal in themselves are unnecessary to the efficient conduct of business.

Judge Wyzanski is to be congratulated for having clarified and extended the doctrine laid down by Judge Hand. His interpretation of the law (as distinguished from his application of it in formulating remedies) reflects boldness and logic and should do much to relieve the uncertainty created by Judge Hand's somewhat vague concept of monopoly's being thrust upon a firm.

When it came to remedies, Judge Wyzanski was no longer bold, although he was equally logical. He realized that the society in which he lived was satisfied with the contemporary business environment and would not tolerate judgments requiring significant changes in it. So long as the methods by which business grew big were

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93 *Ibid.*

94 See note 82 *supra*. The Court later condemned the leasing practices under section 3 of the Clayton Act. *United Shoe Mach Corp.* v. *United States*, 258 U. S. 451 (1922), and United thereupon softened some of the more onerous provisions.

95 *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 343 (D. Mass. 1953), *aff'd*, 347 U. S. 521 (1954). (Emphasis added.)

not flagrantly predatory and even though the size achieved was larger than need be for efficiency, the public identified big business with success and would not support the necessary surgery to reconstruct it into more competitive units. As Judge Wyzanski stated the matter,

> To many champions of the anti-trust laws these cases indicate judicial timidity, economic innocence, lack of conviction, or paralysis of resolution. Yet there is another way of interpreting this judicial history. In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law. Indeed, the only comparable examples of the power of judges is [*sic*] the economic role they formerly exercised under the Fourteenth Amendment, and the role they now exercise in the area of civil liberties. They would not have been given, or allowed to keep, such authority in the anti-trust field, and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power.[96]

Thus did Judge Wyzanski adjust his decision to the temper of the times. He did not order dissolution of the United Shoe Machinery Corporation into three independent companies, as asked by the Government, because it was impractical to do so. He did not order United to discontinue the leasing of machines and sell them outright, a policy recommended by his economic adviser,[97] but left United with the alternative of selling or leasing them (under less restrictive terms than United had imposed) at the option of the user. He concluded that to prohibit leasing altogether would be

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[96] *Id.* at 348.

[97] Carl Kaysen, associate professor of economics at Harvard University, served for two years as economic assistant to Judge Wyzanski while the *Shoe Machinery* case was being tried. He completed his original memorandum for the court in October 1952 and published it with additions in book form in 1956. For his recommendations on putting an end to leasing see *United States* v. *United Shoe Machinery Corporation* 275-89 (1956).

"undesirable at least until milder remedies have been tried." [98] He did not carry divestiture as far as his economic counsellor thought desirable,[99] being content with merely ordering divestiture of United's business in nails, tacks, and eyelets—"this is the kind of dissolution which can be carried out practically" [100]—and of its distributorship of shoe factory supplies made by companies not a part of United's organization.[101] The court did not order compulsory licensing of United's patents on a royalty-free basis, but the milder remedy of compulsory licensing at reasonable royalties.[102]

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[98] *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 349 (D. Mass. 1953), *aff'd*, 347 U. S. 521 (1954).

[99] Kaysen thought a new shoe machinery and shoe factory supply manufacturer could be created by "divesting United of B. B. Chemical Corporation, its own Cement Shoe department, its two eyelet manufacturing branches, S. O. and O. C. Co. and J. C. Rhodes, and its Eyeletting department," and setting them up with suitable administrative branches as a corporation independent of United. This would be "a step in the direction of recreating conditions similar to those which prevailed before the original mergers which created United's predecessor company." Kaysen, *United States* v. *United Shoe Machinery Corporation*, *supra* note 97, at 289.

[100] *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 351 (D. Mass. 1953), *aff'd*, 347 U. S. 521 (1954).

[101] Concerning the latter the court said, "And United ought not to be allowed to continue these distributorships because they flowed to United partly, at any rate, as an indirect consequence of United's prohibited monopolization of shoe machinery. To be sure, other advantages flowed to United from its monopolization; but the particular advantages inherent in the large scale distribution of supplies are . . . *easily* severable." *Ibid.* (Emphasis added.)

[102] According to Kaysen, *op. cit. supra* note 97, at 285, the government sought royalty-free licensing, but "the reason for not requiring . . . [it] is simply that the significance of United's patents in maintaining its market position is not so great as to warrant such a drastic remedy." Perhaps the court was guided more by legal precedent than by the patents' lack of significance to United. It found that of the 3,915 patents United held on December 15, 1947, roughly 95 per cent were the result of its own research; the remainder were acquired and served to buttress United's market power even though their economic purposes could have been fulfilled equally well by obtaining nonexclusive licenses. And "the aggregation of patents does to some extent block potential competition" by inducing inventors to offer their ideas to United and enabling it to hedge against "unforeseen competitive developments." *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 339 (D. Mass. 1953), *aff'd*, 347 U. S. 521 (1954). The court ordered compulsory patent licensing on a reasonable royalty basis as "in effect a partial dissolution, on a nonconfiscatory basis." *Id.* at 351.

The remedy is in line with the law's development on compulsory patent licensing in antitrust cases. *Besser Mfg. Co.* v. *United States*, 343 U. S. 444, 447 (1952); *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 94 (1950); *United States* v.

Although Judge Wyzanski rendered an opinion admirable for its logic and clarity, he refrained from such bold remedies as would satisfy those "aiming at immediate realization of the social, political, and economic advantages of dispersal of power." He chose milder ones more in keeping with the spirit of the times, with the preconceptions and prejudices of those who regard big business as one of the noblest achievements of this era. His decision is likely to find approval by all reasonable men who have made peace with their environment.

The Cellophane Case

The doctrine of workable competition has provided an institutional basis for a lax administration of the antitrust laws. It has afforded a logical reconciliation between a law that condemns in a sweeping manner all combinations in restraint of trade and all monopolizing and attempts to monopolize, and an economic, cultural, and technological environment conducive to vast aggregations of capital in firms so large that they necessarily have power over the market. As a standard in antitrust judgments it has encouraged a rationalization of the status quo. As previously pointed out, the standards by which economists would judge the workability of any arrangement in which sellers vie with one another for the trade of their customers are the structure of an industry, the conduct of firms which comprise it, and their economic performance. The relative weight attached to these several criteria depends on individual judgments. Some economists and a larger number of lawyers attach little importance to structure, holding that competition may be effective with only a few firms in a market, even with only one

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National Lead Co., 332 U. S. 319, 338 (1947). The Supreme Court has refused to order royalty-free licensing on the ground that it would amount to a forfeiture of the patents, a remedy not appropriate to a Sherman Act violation having nothing to do with their validity. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 414-15 (1945). The Court had earlier denied the right to sue for infringement to a patentee found to have used his patent to monopolize an unpatented article, *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942); *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495 (1942), but it declared that denial of this property right in such circumstances was not a precedent for antitrust remedies that were confiscatory. *Hartford-Empire Co.* v. *United States*, *supra*, at 415.

if the market be narrowly defined.[103] Those who hold this point of view look to interindustry competition to protect the consumer from exploitation.[104] Others hold that the structure of an industry may determine the conduct of the firms that comprise it.[105] This point of view is well expressed by Chief Justice Warren in his dissent in the *Cellophane* case: "The conduct of du Pont and Sylvania [Sylvania Industrial Corporation of America, the only other producer during the period covered by the case] illustrates that a few sellers tend to act like one and that an industry which does not have a competitive structure will not have competitive behavior." [106] Some economists, and lawyers too, who attach relatively great importance to conduct as evidence of monopoly look for discriminatory and predatory practices as the key element in antitrust violations.[107] Others examine the broad strategy of a firm, as did Judge Wyzanski in the *Shoe Machinery* case. And finally some economists and lawyers attach primary importance to an industry's performance as evidence of the workability of competition.[108] Those who do may be concerned less about the existence of power than the manner in which power is exercised. When an industry is characterized by rapid technological advances, when cost and prices show a consistent downward trend, when the product is continuously improved —in short, when the industry's performance appears to be consistent with the general welfare—those attaching primary importance to

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103 Adelman, *Effective Competition and the Antitrust Laws*, 61 Harv. L. Rev. 1289 (1948); B. Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws*, 26 N. Y. U. L. Rev. 405 (1951); Sunderland, *Changing Legal Concepts in the Antitrust Field*, 3 Syracuse L. Rev. 60 (1951).

104 Robertson, *On the Changing Apparatus of Competition*, 44 Am. Econ. Rev. (Proceedings of the American Economic Ass'n) 61 (1954).

105 Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 Ind. L. J. 1 (1951); Lewis, *The Effectiveness of the Federal Antitrust Laws: A Symposium* (ed. Keezer), 39 Am. Econ. Rev. 689, 703 (1949); Rostov, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. Chi. L. Rev. 567 (1947).

106 *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 426 (1956). In 1946 Sylvania merged with The American Viscose Corporation.

107 E.g., Dirlam and Kahn, Fair Competition: The Law and Economics of Antitrust Policy (1954).

108 Griffin, An Economic Approach to Antitrust Problems, American Enterprise Association (1951); Griffin, *Needed: A Realistic Antitrust Policy*, Harv. Bus. Rev., Nov.-Dec. 1956, p. 76; B. Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws*, 26 N. Y. U. L. Rev. 405 (1951).

performance may consider questions about market power merely academic. With the experts disagreeing on the relative importance of structure, conduct, and performance to the workability of competition, the judges must find standards of their own. The standards of the business community are apt to count for more with them than the standards of the academicians.

Seen in this light the district court's decision in the *Cellophane* case[109] should surprise no one. In handing down his decision (which runs through 192 printed pages and presents a detailed but superficial analysis of the evidence), Judge Leahy pointed out that the charge against du Pont of having monopolized cellophane involved two questions: "1. does du Pont possess monopoly powers; and 2., if so has it achieved such powers by 'monopolizing' within the meaning of the Act and under United States v. Aluminum Company of America"?[110] He concluded that "unless the first is decided against defendant, the second is not reached." [111] Judge Leahy did not need to reach the second question, for he found the defendant not guilty. He concluded his opinion with these significant remarks:

> The facts destroy the charges here made. There has been no monopolization or conspiracy or combination or attempt to monopolize shown. The record reflects not the dead hand of monopoly but rapidly declining prices, expanding production, intense competition stimulated by creative research, the development of new products and uses and other benefits of a free economy. [Neither] DuPont nor any other American company similarly situated should be punished for its success. Nothing warrants intervention of this court of equity. The complaint should be dismissed.[112]

The Supreme Court by a vote of four to three affirmed this judgment.

The Relevant Market for Cellophane

Judge Leahy in reaching his decision considered many supplementary issues, but the decision rests primarily on the single question,

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109 *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953).

110 *Id.* at 54.

111 *Ibid.*

112 *Id.* at 233.

what is the relevant market in which du Pont sells cellophane? Is cellophane a differentiated product with characteristics peculiar to itself which isolate it from the competition of other products, or is it merely one of many flexible wrapping materials that possess varied characteristics but on the whole are so much alike that one may readily substitute for another and the producers of all compete vigorously for consumers' preference? The Supreme Court accepted the issue as Judge Leahy defined it. In considering this issue Judge Leahy concluded that

> cellophane is not a unique flexible packaging material in any functional or economic sense. In terms of uses for which cellophane is sold, and the qualities it brings to each use as a wrapping material, cellophane is interchangeable and *in fact* continually interchanged with many flexible packaging materials.[113]

Judge Leahy classified sixteen flexible wrapping materials according to eleven characteristics considered by industrial buyers in gauging their relative merits, and he discussed at length the characteristics of eleven—including aluminum foil, certain films, waxed and greaseproof paper, and glassine—which he regarded as interchangeable with cellophane. He noted that several hundred firms compete in their production and sale and that du Pont in 1949 accounted for only 17.9 per cent of their total square yardage of domestic output and imports.[114]

Purchasers of flexible wrapping materials are primarily makers and distributors of the consumers' goods they package. They are cost- and profit-conscious and carefully compare the qualities and prices of available wrapping materials. They endeavor to choose the material which will win consumer preference and which, cost considered, will yield the highest profit on the goods they market.[115] Such wrapping materials fall into four main categories: (1) opaque

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113 *Id.* at 63. (Emphasis in original.)

114 *Id.* at 111.

115 "Manufacturer of packageable products has a choice of materials from which to choose. Purchase price, cost of application, service available, and functional qualities of each material are factors which control choice, and control volume of material that can be sold in competition with others." *Id.* at 88.

nonmoistureproof wrapping *paper* designed primarily for convenience and protection in handling packages; (2) moistureproof *films* of varying degrees of transparency designed primarily either to protect, or to display and protect, the products they encompass; (3) nonmoistureproof transparent *films* designed primarily to display and to some extent protect, but which obviously do a poor protecting job where exclusion or retention of moisture is important; and (4) moistureproof *materials* other than films of varying degrees of transparency (foils and paper products) designed to protect and display.

Kraft paper is the leading opaque nonmoistureproof wrapping paper. It is relatively cheap, strong, and pliable and gives adequate protection. It does not meet the competition of other wrapping materials for the purposes for which it is primarily designed—the convenient wrapping of packages. At less than one cent per thousand square inches, kraft paper sells for less than cellophane costs. Although Judge Leahy did not specifically recognize the fact, clearly kraft paper does not fall into the relevant market for cellophane.

In 1949, 80 per cent of du Pont's cellophane sales were for packaging food products, and for this use cellophane encounters the vigorous rivalry of vegetable parchment, greaseproof paper, glassine, waxed paper, aluminum foil, pliofilm, Saran, and other films. Judge Leahy analyzed in some detail the nature and extent of rivalry among these materials for wrapping a large number of specific products: white bread, specialty breads, cake and sweet goods, meat, candy, crackers and biscuits, frozen foods, potato chips, popcorn and snacks, cereals, fresh produce, paper goods and textiles, butter, cheese, fish, oleomargarine, chewing gum, other food products, and cigarettes and other tobacco products. Only in the wrapping of cigarettes did cellophane supply as much as 50 per cent of the total quantity (in square inches) of wrapping materials used.[116] It sold only 6.8 per cent of the wrapping materials used for packaging bakery products. Only as a wrapper for fresh produce did it top

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116 In the outer wrapping of packaged cigarettes cellophane has no effective rival. Du Pont cellophane wraps 75 to 80 per cent of the cigarettes sold in the United States. *Id.* at 114. Ordinarily it is only when they can't get it that cigarette makers use any other material, e.g. during a cellophane shortage in the mid-forties. Brown and Williamson Tobacco Co. once experimented with selling Kools and Raleighs in a one-piece foil package. *Id.* at 108.

the list, and in this field it supplied only 47.2 per cent of the total wrapping materials used. This to the district court did not look like market domination. After examining the shifts among the various materials in their several uses (particularly in the wrapping of candy), after hearing the testimony of flexible wrapping material converters and users, after receiving the results of a market survey prepared by du Pont, after examining the reports of du Pont salesmen, after taking judicial notice of trade publications and writings, and after a personal visit to the 1952 Annual Packaging Show in Atlantic City to see at first hand the manner in which such materials were offered for sale to the trade, Judge Leahy concluded that "duPont cellophane is sold under such intense competitive conditions [that] acquisition of market control or monopoly power is a practical impossibility." [117] By making a detailed examination of the economic factors at work in the relevant market for cellophane as he defined that market, Judge Leahy wrote an opinion that won the approval of the proponents of workable competition. But, as will be shown later, an analysis of economic factors is no better than the analyst's understanding of each factor.

Although its reasoning is more formal and technical than Judge Leahy's, the Supreme Court did not do much better. It accepted as the main issue in the case the relevant market for cellophane, and it gave the term "relevant market" a new definition: "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities *reasonably* interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." [118]

The Concept of Cross-Elasticity of Demand

To determine "reasonable" interchangeability the Court introduced the concept of cross-elasticity, saying:

> An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one

117 *Id.* at 197-98.

118 *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 395 (1956). (Emphasis added.)

> product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market.[119]

But without testing the facts by correct application of the principle the Court accepted Judge Leahy's findings that the " 'great sensitivity of customers in the flexible packaging markets to price or quality changes' prevented du Pont from possessing monopoly control over price." [120] The Court concluded that "cellophane's interchangeability with the other materials mentioned suffices to make it a part of this flexible packaging material market." [121]

Cross-elasticity is a technical economic concept. By incorporating it into its reasoning the Court ostensibly gave the law a method by which to measure more realistically, the workability of competition. In the hands of experts supplied with detailed data on cost changes, price, and shifts in demands, the concept should prove useful in determining the extent to which substitute products can prevent the exploitation of consumers by would-be monopolists. In the hands of judges in antitrust cases the concept is probably not of much use. It may prove a positive deterrent to the effective administration of the Sherman Act. The Supreme Court correctly conceived cross-elasticity as defining the extent to which a change in the price of commodity A affects the sales of commodity B. But to recognize this is to state the problem, not to solve it. If a decrease in A's price diminishes B's sales, cross-elasticity is positive. All this says is that a significant number of consumers, after considering the relative merits of the two products and their prices, have substituted a product whose price has been lowered for one whose price remains unchanged. If a given decrease in the price of one commodity results in a relatively large decrease in the sales of the other, cross-elasticity is said to be high.

On the ratio of cross-elasticity between cellophane and any other wrapping material both Judge Leahy and the Supreme Court are

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119 *Id.* at 400.

120 *Ibid.*

121 *Ibid.*

necessarily silent. To determine it business rivals would have had to disclose confidential information which the *Cellophane* case does not reveal. But even if the du Pont record had disclosed the revelant confidential data on changes in sales and prices, and a high positive cross-elasticity between cellophane and a substitute wrapping paper had been shown, this would not warrant the conclusion that the seller of either product was not a monopolist. To determine whether either firm possesses monopoly power it would be necessary to examine the price response of the firm losing business and the cost-price relationships of both products. To recapture business lost or to prevent further losses to product A the firm making product B must lower its price. If price decreases in product A do not bring a decrease in the price of B, a lack of competition between them is indicated. Either the loss of business is too slight to matter—that is, cross-elasticity is low—or the producer of product A has a monopoly advantage which the producer of product B does not have. If product B was already selling at a competitive price, i.e., marginal cost, its producer could not afford to reduce the price, and if he continued to lose business it would have no alternative in the long run but to cease operations. That the producer of product A could afford to reduce its price suggests that it was already getting a monopoly profit, a profit which it hopes to enlarge by selling more at lower prices.

So much for the logic. What are the facts in the *Cellophane* case? Between 1924 and 1938 du Pont reduced the price of cellophane every year, presumably in an effort to increase profits by increasing volume, for a total reduction of over 80 per cent.[122] During this same period the price of glassine and from 1933 the price of waxed paper (prices for earlier years are not available), the two largest selling wrapping papers, remained virtually unchanged. From 1938 to 1940 the price of cellophane declined by 8.6 per cent. During the same years the prices of waxed paper and glassine actually increased. This indicates a low cross-elasticity of demand. Apparently du Pont could ignore the prices of rival papers in setting its own prices. From 1924 to 1950 the price of the principal type of moistureproof cellophane was at all times

[122] Table of annual average prices from 1924 to 1950, *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 82 (D. Del. 1953).

for which figures are available from two to seven times that of 25# bleached glassine and from two to four and one-half times that of 30# waxed paper, despite a reduction in the average price of cellophane from $2.51 to 49 cents a pound.[123] To the economically sophisticated this is sufficient evidence that cellophane is a unique product. As the Supreme Court dissenting opinion put it:

> We cannot believe that . . . practical businessmen would have bought cellophane in increasing amounts over a quarter of a century if close substitutes were available at from one-seventh to one-half cellophane's price. That they did so is testimony to cellophane's distinctiveness.[124]

As these price changes took place, cost-conscious buyers (candy manufacturers were a conspicuous example) were constantly revising their judgment as to the relative merits of cellophane, glassine, and waxed paper at the prices at which they could be bought, and some buyers switched from one product to the other. But this is a deceptive interchangeability. Rational buyers will revise their judgment of the relative value of several products that serve roughly the same purpose whenever the price of one or the other changes, and they will not be deterred from doing so merely because the seller of one product is a monopolist. In a general sense all products compete for the consumer's dollar, and a wise monopolist will so adjust coss-price relationships as to obtain the highest return on his investment. He may do so by selling much at a low profit per unit or little at a high profit per unit. That he chooses one policy in preference to the other does not mean that he has surrendered his monopoly. He is merely exploiting it wisely.

Du Pont's Price Policy and Earnings on Cellophane and Rayon

Du Pont officials thought that du Pont could make more money by reducing prices and selling more cellophane. President Yerkes of the Du Pont Cellophane Company expressed his views in this way:

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[123] Defendant's Brief on the Facts and the Law, Appendix A (graph based on prices per 1,000 sq. in.), *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953).

[124] *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 417 (1956).

> I am in favor of lowering the price. . . . [I] think it will undoubtedly increase sales and widen distribution. . . . Our price I think is too high based purely on manufacturing cost and too high in comparison with other wrapping papers on the market, and while we cannot approach the price of glassine or other oil papers, if we make a substantial reduction we will in some cases get somewhere near there.[125]

Walter S. Carpenter, Jr., du Pont's board chairman, stated the du Pont cellophane policy as follows:

> . . . the purpose of reducing our price and also improving our quality was to broaden our market. . . . As a general philosophy I was always in favor of the reduction of the price as we were able to do so by the reduced costs, and I think that I consistently urged that on the management.[126]

Du Pont's policy paid off. During the years from 1924 to 1950 du Pont's cellophane earnings before taxes ranged from 18 per cent to 62.4 per cent on operating investment. They averaged 34.4 per cent.[127] Du Pont's general policy was to increase profits by lowering cost and increasing volume, but its managers did not hesitate to reverse this policy when they thought it would pay to do so. In 1947 earnings had fallen to 19.1 per cent before taxes. Not satisfied with this rate du Pont raised the average price of cellophane from 41.9 cents a pound to 46 cents. The result was an increase in earnings to a 31 per cent rate. At that time its division manager suggested that "if operative earnings of 31 per cent is [*sic*] considered inadequate, then an upward revision in prices will be necessary to improve the return." [128] He proposed a schedule of prices designed

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125 Memorandum of some remarks made at a meeting of the board of directors, Du Pont Cellophane Co., Dec. 11, 1924, Defendant's Exhibit 337, p. 643, *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953). (Hereinafter the references to the exhibits and testimony in this case will not repeat the case citation.)

126 Transcript of Testimony 6278-79.

127 Du Pont's Operating Investment, Operating Earnings, and Net Earnings on Cellophane, 1925-1950, Table III, in Stocking and Mueller, *The Cellophane Case and the New Competition*, 45 Am. Econ. Rev. 29, 59 (1955).

128 Government's Exhibit 591, p. 7539.

to yield about 40 per cent. This was put into effect in August 1948. Earnings responded quickly, yielding 35.2 per cent in 1949 and 45.3 per cent in 1950. In raising prices du Pont officials apparently were more concerned about the unfavorable publicity this might give them and the effect it might have on the case then pending before Judge Leahy than they were about the relation of cellophane prices to the prices of other wrapping materials. A du Pont division manager put it this way:

> What effect, if any, will a price increase have on our case when it is heard before the Federal Judge? I have not covered this with our Legal Department but in view of the position they took last July and August, prior to the October increase, I am inclined to think they should be brought in for a discussion on this matter.
>
> The Du Pont Company may get some undesirable publicity from the press. A price increase on Cellophane could be looked upon as added fuel to the present recent spurt in the inflationary spiral and add to the present pressure for an increase in wages. This question is currently a live one at several of our cellophane plants. Probably it would be in order to discuss this with Mr. Brayman.[129]

Only after weighing such factors as these did du Pont officials decide on the price increase.

That du Pont's earnings on cellophane reflected monopoly power is indicated not only by their absolute heights but by comparison with its earnings on its rayon investment. There is a basic similarity between these two products and, up to a certain point, between the ways in which they were developed. Both are derived from the same basic raw material. Both were radical innovations. Du Pont obtained its production rights to both from French producers; both were produced under the same business management and presumably with common business aims; both products have reasonably close substitutes; both experienced a phenomenal increase in production and consumption; both were characterized by rapidly developing technology and a rapid decline in price; and both yielded

129 *Id.* at 7540. Mr. Brayman was the director of du Pont's public relations department.

a high rate of return in their early years, du Pont's earnings on its rayon investment ranging from a high of 38.9 per cent to a low of 15.2 per cent during the period 1922-1929.[130] At the outset both were produced under conditions of monopoly or near monopoly. Here the similarity ends. Du Pont was the sole producer of cellophane until 1930 and thereafter du Pont and Sylvania were the sole producers until 1951, when a third company with du Pont's aid began production.[131] The American Viscose Corporation was the sole producer of rayon at the outset, soon followed by du Pont, but by 1930 the structure of the rayon industry had markedly changed and du Pont was meeting the rivalry of eighteen producers.[132] This intensification of competition resulted in a sharp decline in the rate of earnings. Du Pont operated its rayon division at a loss in 1930 and averaged only 7.5 per cent in the period from 1930 to 1938.[133] During this same period the rate of return on cellophane ranged from 18 to 39.9 per cent.[134]

The Strategy of a Monopolist

Not only did its rate of cellophane earnings reflect monopoly power, but du Pont acted with respect to Sylvania as though it believed it had a valuable monopoly that it wanted to protect.[135] It originally obtained the exclusive right to make and sell cellophane

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130 Federal Trade Commission, Investments, Profits, and Rates of Return for Selected Industries (a special report prepared for the Temporary National Economic Committee, 76th Cong., 3d Sess.), 1941, pp. 17988, 17990, 17998. Comparable data on total rayon investment and earnings are not available after 1938. The district court found that du Pont's "price policy for rayon was the same as for cellophane." 118 F. Supp. at 86.

131 In June 1951 Olin Industries, Inc. (in 1954 this company merged with Mathieson Chemical Industries, Inc. to become Olin Mathieson Chemical Corp.) began the production of cellophane at Pisgah Forest, North Carolina. Testimony of Fred Olsen, Olin vice president, Transcript of Testimony 6829. In 1948 du Pont began making its technology available to Olin. Report on "the evidence in support of entry by Olin Industries into the Cellophane business, based on the purchase of patent license 'know-how' from du Pont," Dec. 15, 1948, Government's Exhibit 566, p. 7575.

132 Markham, Competition in the Rayon Industry 47 (1952).

133 Federal Trade Commission, *op. cit. supra* note 130, *ibid.*

134 Stocking and Mueller, *supra* note 127, *ibid.*

135 For a more detailed discussion of the significance of strategy to monopoly see *id.* at 31-44. The statements of fact which follow in the text are based on the district court's findings unless otherwise documented.

in the American market under patents and with technical knowledge from La Cellophane, Société Anonyme, a French affiliate of the Comptoir des Textiles Artificiels, a French corporation from which it had previously obtained similar rights for rayon manufacture. After entering the agreement with du Pont for the exploitation of the American market La Cellophane made a similar agreement with Kalle & Company for the exploitation of the German market—and ultimately the markets of Austria, Hungary, Czechoslovakia, Yugoslavia, Poland, Russia, Romania, China, Denmark, Sweden, Norway, and Finland[136]—and licensed British Cellophane, Ltd. for the exploitation of British markets. Du Pont thereafter entered into patent exchange agreements with Kalle and British Cellophane which had the practical effect of dividing world markets for exclusive exploitation by the several companies. Du Pont representatives attended an international cartel conference at Paris in February 1930 as guests and observers, and although they did not sign the official cartel agreement, the agreement recognized the North American market as belonging to du Pont and Sylvania.[137] When the Belgian company Société Industrielle de la Cellulose (SIDAC), which had obtained La Cellophane's trade secrets through two former employees of La Cellophane, began to export cellophane to the American market, du Pont sought and obtained additional tariff protection through a reclassification of cellophane. This raised the duty from 25 per cent to 60 per cent ad valorem, a rate high enough to prevent price cutting by importers.[138] A reduction of cellophane prices as du Pont achieved quantity production and lower costs, together with a 45 per cent ad valorem tariff in the Tariff Act of 1930, was enough to virtually eliminate foreign cellophane from the American market. In no year between 1930 and 1947 did imports amount to 1 per cent of domestic cellophane consumption.

Shut out by the tariff from the rich American market, SIDAC established an American subsidiary, Sylvania Industrial Corporation of America, for the manufacture and sale of cellophane in com-

[136] Letter of Oct. 30, 1929 from C. M. Albright, Du Pont Cellophane vice president, to the company's Buffalo Office, Government's Exhibit 1091, p. 1195.

[137] "Official report" of February 11-12, 1930 international cellophane cartel agreement, Paris, Government's Exhibit 1414, pp. 1841-44.

[138] Du Pont's quarterly competitive report, second quarter 1929, Government's Exhibit 432, p. 5690.

petition with du Pont. Du Pont inaugurated a series of negotiations with Sylvania regarding patent rights and eventually filed a patent infringement suit which was finally settled out of court.[139] The settlement involved an interchange of patent rights and a limitation of Sylvania's production. Sylvania agreed to restrict its production to 20 per cent of total sales of moistureproof cellophane in 1933, this percentage to be increased by 1 per cent annually untii it reached 29 per cent in 1942 and the agreement to be enforced by prohibitive royalties for exceeding the amount specified. Sylvania not only geared its production to du Pont's but followed du Pont's pricing practices. Meanwhile, as a bulwark against competition from any other source, du Pont was carrying forward a vigorous program to cover by patents all alternative methods of moistureproofing cellophane.[140]

Du Pont by these several moves clearly recognized cellophane as a unique product which it was determined to produce on a monopoly basis. Du Pont's own executives from time to time

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139 Du Pont's patent attorney gave his impressions of Sylvania's reasons for settling the infringement suit as follows: "During the conference Mr. Menken [Sylvania's general counsel] stated that in his opinion the case should be settled. He said that they were very fearful of what the result would be to their company in the event they succeeded in having the claims of the patents which are involved in the litigation held invalid. He seemed to realize the old adage that the defendant can never win. . . . If the Du Pont Cellophane Company succeeds and the patents are held to be infringed, Sylvania Industrial Corporation will be under injunction and will be obliged to stop manufacturing moistureproof wrapping tissue. On the other hand, if they succeed in having the broad claims of the patents held invalid they will throw the art open, as far as the broad claims are concerned, to anyone and therefore will have additional competition. Sylvania . . . has plenty of ready cash but are [*sic*] hesitant about enlarging their plant facilities pending the litigation since, if successful, they will only invite further competition." Letter dated Aug. 4, 1932, Government's Exhibit 2811, pp. 6073-74.

140 President Yerkes of Du Pont Cellophane Co. in reporting on the success of this project in 1934 said: "This work was undertaken as a defensive program in connection with protecting broadly by patents the field of moistureproofing agents other than waxes which was the only class of material disclosed in our original Cellophane moistureproofing patents.

"The investigations on this subject did, in fact, lead to the discovery of a number of classes of materials which could serve equally well for moistureproofing agents. . . . Each of these classes has been the subject of a patent. . . . Altogether, 13 patent applications are being written as a result of the work done under this project, all in view of strengthening our Moistureproof Cellophane patent situation." Dec. 1933 report to Du Pont Cellophane's board of directors, Jan. 22, 1934, Government's Exhibit 488, p. 6478.

specifically acknowledged the ineffectiveness of the competition of rival products. Its Development Department concluded as early as 1923 that glassine, sheet gelatin, and tin foil, at that time cellophane's closest rival products, offered no serious competition because of price and quality differences. Du Pont's 1948 market analysis report evaluated the rival films that had since come on the market in these words:

> The principal markets for non-viscose films have been competitive with Cellophane only to a very minor degree up to this time. Some are used very little or not at all in the packaging field—others are employed principally for specialty uses where Cellophane is not well adapted—none have been successfully introduced into any of Cellophane's main markets due to their inherent shortcomings.[141]

While du Pont was negotiating with Olin Industries, Inc., prior to Olin's becoming the third domestic cellophane producer,[142] Olin Industries reported, "According to du Pont, Cellophane is considered the only all purpose film, and any product to be *truly competitive* with Cellophane must have the following attributes: (1) low cost, (2) transparency, (3) operate with a high efficiency on mechanical equipment, (4) print well both as to speed and appearance."[143] Olin concluded:

> There are no films currently marketed which are potentially competitive to any substantial degree in Cellophane's major markets when measured by the above attributes necessary for wide usage. Other transparent films will find their place for those low volume uses which can absorb the additional cost of the film and which necessitate certain physical properties not possessed by Cellophane.[144]

Significance of the Cellophane Case

Judging by the structure of the cellophane industry between 1923 and 1951 (with only two producers and with Sylvania's output

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141 Government's Exhibit 595, p. 1147.

142 See note 131 *supra*.

143 Government's Exhibit 566, p. 7575.

144 *Ibid.*

and pricing policy geared to du Pont's), by the strategy du Pont followed in protecting itself against the competition of rival producers, and by the industry's performance in terms of profit margins, I conclude that cellophane has been sold in American markets under the protection of private monopoly. The basic issue in the *Cellophane* case is clear. I have stated it elsewhere as follows:

> The basic issue in the *Cellophane* case really boils down to this: Would freedom of entry have brought in a larger number of cellophane producers and ultimately lower prices and earnings than have prevailed? I believe it would have. Moreover, if the rivalry of substitute packaging materials, particularly glassine and waxed paper, had in fact forced competitive pricing on du Pont, as the court concluded, du Pont should have been indifferent to the entry of rival cellophane producers. Competition from either cellophane or waxed paper would have resulted in precisely the same cost-price ratios in selling cellophane. As judged by structure, conduct, and performance, Judge Leahy erred in giving a negative answer to his first question: Does du Pont have a monopoly in making and selling cellophane?[145]

And the Supreme Court compounded Judge Leahy's error. If the Supreme Court's conception of cross-elasticity of demand should apply in future antitrust causes, the dissenters are probably right in declaring that the Court has emasculated section 2 of the Sherman Act. If cellophane is merely a flexible wrapping material, the courts might as readily conclude that airlines, railways, bus lines, and river steamers are merely transportation facilities; that aluminum, copper, brass, and steel are merely metals; and that cotton rugs, linen rugs, nylon rugs, braided rugs, linoleum, and similar substitutes are merely floor coverings. Monopolization of one such item need not violate the Sherman Act. To deny the existence of monopoly the courts need only ascertain that people choose among products serving similar functions in trying to get their money's worth.

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145 Stocking, *Economic Tests of Monopoly and the Concept of the Relevant Market, Illinois State Bar Ass'n Antitrust Section Symposium*, Nov. 29, 1956, 2 Antitrust Bulletin 479, 492-93 (1957).

Technological progress has increased the variety of products which will serve a particular need. Customers nearly always have a choice between rival products with different specific qualities and different prices. This is the interindustry competition which some economists and laymen think is a substitute for the competition of rival sellers selling the same product. Many believe it makes the contemporary economy workably competitive regardless of a given industry's structure. "Interindustry competition" is a concept by which "reasonable" men may judge a situation without meticulous attention to the relevant economic logic. It enables judges as well as economists to make peace with their environment. Justice Frankfurter in a concurring opinion in the *Cellophane* case put it this way:

> . . . the so-called issues of fact and law that call for adjudication in this legal territory are united, and intrinsically so, with factors that entail social and economic judgment. Any consideration of 'monopoly' under the Sherman law can hardly escape judgment, even if only implied, on social and economic issues.[146]

THE DU PONT-GENERAL MOTORS CASE IN THE DISTRICT COURT

On June 30, 1949, the Antitrust Division of the Department of Justice filed a complaint against du Pont Company and the General Motors Company, alleging that since 1915 these companies had engaged in a combination to restrain trade in the products of the companies and to monopolize a substantial part of that trade in violation of sections 1 and 2 of the Sherman Act. The complaint also alleged violation of section 7 of the Clayton Act. The primary issue in the case was whether the du Pont Company through stock acquisitions had obtained control of General Motors, and if so whether it exercised that control to insure it a protected market for such of its products as were necessary to the business of General Motors and to give it control over the chemical products and processes that General Motors might develop. The district court in finding for the defendants did not rely specifically on the doctrine

146 *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 414 (1956).

of workable competition. In a hundred-page decision[147] Judge LaBuy did not even mention the concept nor did he cite a single legal precedent for his decision. He concluded that the facts did

> not establish that du Pont has been the controlling force in the direction of General Motors affairs, or has been in a position to act as if it owned a majority of General Motors stock. The record shows consultation and conference, but not domination.[148]

Judge LaBuy may have appropriately exercised his judicial prerogative in so holding, but it is fairly clear that a district court with different preconceptions sitting in an environment less friendly to big business might just as readily have found that du Pont controlled General Motors.

The more relevant facts on this issue may be briefly stated. Pierre S. du Pont, president of the du Pont Company, and Irenee du Pont as individuals had bought substantial amounts of stock in the General Motors Corporation as early as 1915. In December 1917 the du Pont executive and finance committees authorized the du Pont Company to purchase $25,000,000 of General Motors common stock. John J. Raskob, treasurer of the du Pont Company, in urging the company to make this purchase, said:

> With Mr. Durant we will have joint control of the companies.
> . . . .
> Perhaps it is not made clear that the directorates of the motor companies will be chosen by Du Pont and Durant. Mr. Durant should be continued as President of the Company. Mr. P. S. du Pont will be continued as Chairman of the Board, the Finance Committee will be ours and we will have such representation on the Executive Committee as we desire. . . .[149]

By 1921 the du Pont Company had increased its investment in General Motors to $79,500,000, representing 38 per cent of the

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[147] *United States* v. *E. I. du Pont de Nemours and Co.*, 126 F. Supp. 235 (N. D. Ill. 1954), *rev'd*, 353 U. S. 586 (1957).

[148] *Id.* at 250-51.

[149] Government's Trial Exhibit (hereinafter GTX) 124, Record (hereinafter R.) 664, 5230, *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957). See also the district court's opinion, 126 F. Supp. at 241-42.

company's outstanding stock. About this transaction Raskob stated, "This gave the du Pont Company approximately 38% of the total common stock of the General Motors Corporation which is practical control and made it necessary to assume complete responsibility for the management." [150] By 1938 du Pont had reduced its holdings to 23 per cent by a transfer of stock to the Managers Securities Company and through the Securities Company to select executives of General Motors under a stock bonus plan. Du Pont's holdings have since remained at 23 per cent. In 1947 this represented 10,000,000 shares, which in 1950 were split to 20,000,000 shares[151] and by 1957 had increased to 63,000,000 shares.[152] In 1947, 436,510 stockholders held the remaining shares. Of these, 92 per cent owned no more than 100 shares each and 60 per cent owned no more than 25 shares each.[153] At stockholders' meetings in the years 1928-1949 du Pont voted from 30 to over 52 per cent of the stock voted.[154] A proxy committee set up by management friendly to du Pont presumably voted much of the remainder.

The record is replete with evidence that du Pont tried to use its control to get General Motors to buy its products rather than those of its competitors, and that it was in part successful. There is an abundance of evidence indicating that du Pont tried to get a general agreement with General Motors whereby General Motors would turn over to du Pont for exploitation the chemical processes and products which it developed in its own research laboratories; and that du Pont eventually obtained a monopoly in the manufacture of tetraethyl lead, first discovered in the laboratories of General Motors, and a monopoly in the exploitation of freon (an organic fluorine compound) and its derivatives, likewise a General Motors discovery.[155]

Counsel for defendants contended that these several transactions were arm's length transactions involving no coercion, and the district

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150 GTX 235, p. 3, R. 483, 3496.

151 126 F. Supp. at 244.

152 Wall Street Journal, June 4, 1957, p. 2, col. 2. The *Journal* placed the market value of the stock at $2.5 billion.

153 126 F. Supp. at 244.

154 GTX 1307, R. 664, 5230.

155 For a detailed analysis of the evidence supporting this view of the case see Stocking, *The du Pont-General Motors Case and the Sherman Act*, 44 Va. L. Rev. 1 (1958).

court agreed. But a different court with different preconceptions might just as readily have concluded, as an earlier court in a different case had done, that "domination may spring as readily from subtle and unexercised power as from arbitrary imposition of command." [156]

Conclusions

This study has developed the thesis that cultural environment—the economic and social milieu—determines the attitudes of the courts in antitrust decisions; and that economists who, like judges, have responded to the same influences, have afforded in the concept of workable competition a logical basis for a lax administration of the Sherman Act. The Supreme Court's reversal of the district court in the *du Pont-General Motors* case[157] would seem to cast doubt on this thesis. Always there are some judges, doughty individualists, who do not drift with the current. That fact might offer a sufficient explanation for the Supreme Court's having overruled the district court. Justices Brennan, Black, and Douglas and Chief Justice Warren constituted the majority in this case. Justices Black and Douglas have made clear in many decisions their belief that a concentration of economic power constitutes a threat to the American way of life. Justice Brennan and Chief Justice Warren appear to be like-minded. Some lawyers have expressed the opinion that had Justices Clark, Whittaker, and Harlan participated in the *du Pont-General Motors* case the decision might have been five to four in favor of the defendants.[158] This is, of course, conjecture, though perhaps reasonable conjecture.

But the majority of the Court in reversing Judge LaBuy may not have been merely manifesting their own predilections. The flow of environmental factors has been generally in one direction, but always there have been countercurrents of varying force. Although the war-engendered prosperity gave the leaders of industry a new confidence in big business and its contribution to the social welfare ("What is good for the country is good for General Motors and

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[156] *North American Co.* v. *SEC*, 327 U. S. 686, 693 (1946).

[157] *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957).

[158] Rogers, *U. S.* v. *du Pont—A Judicial Revision of Section 7*, 2 Antitrust Bulletin 577, 581 (1957).

vice versa"),[159] post-war developments have made the going tough for many small and moderate-size firms. They have frequently found it expedient to sell out to their rivals, and many that have not done so have fallen by the wayside. The survival of little business in recent years has become a national concern. It has prompted direct federal aid to little business and has resulted in a modification of section 7 of the Clayton Act[160] designed to stay the forces of industrial concentration. It may be that the judges who constituted the Supreme Court majority in the *du Pont-General Motors* case reflected not merely their own predilections but a countercurrent in the flow of social forces.

159 Former Secretary of Defense Charles E. Wilson at his final news conference before his resignation, New York Times, Oct. 3, 1957, p. 14, col. 4.

160 15 U. S. C. §18 (1952).

THE ADMINISTRATION OF FEDERAL ANTITRUST LAWS

by

VICTOR R. HANSEN*

I am pleased to meet with you this morning. The timing of these meetings each year—coming as they do toward the end of January—suggests the opportunity of appraising last year's results as well as indicating, in a general way, the path to be followed by the Antitrust Division in the year ahead.

With this in mind, my plan today is—first, to look briefly at the year just past. How many and what sort of antitrust cases did this Department bring? And, what significant developments of the law took place? Second, building on such developments, what can we say about our program for the year ahead? To these questions I now turn.

I.

Consider the year just past. Calendar year 1958 saw some fifty-seven new antitrust cases filed. This figure reflects the increased pace of antitrust enforcement during recent years. Thus, fifty-seven is almost twice the number of cases brought seven years ago; ten more than were brought in 1956; and one more than the near record year of 1957.

Much more important, the quality of any enforcement program can hardly be gauged by numbers alone. Also significant is the sort of cases brought. Here, too, last year's program measured well.

Thus, among major cases brought last year was the indictment of the Radio Corporation of America;[1] the indictment of three natural gas companies, and their presidents, in Milwaukee, Wisconsin;[2] and the indictment of twenty-nine major American oil producers[3] for alleged price-fixing. This last case has now been

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ED. NOTE: This speech was delivered before the New York State Bar Association, N. Y. C., Jan. 29, 1959.

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[1] *United States* v. *Radio Corporation of America* (Cr., S. D. N. Y.).

[2] *United States* v. *American Natural Gas Co., et al.* (Cr., D. Wisc.).

[3] *United States* v. *Arkansas Fuel Oil Corp. et al.* (Cr., E. D. Va.).

set for trial in Tulsa, Oklahoma. Finally, five merger proceedings launched last year marked our continued efforts to develop the law under Clayton Act Section 7.

Against this background of cases brought, what significant issues were decided by courts this past year. Paramount here, of course, is the New York District Court decision in the *Bethlehem-Youngstown* case,[4] which dealt with a proposed merger of the second and sixth largest steel companies.

Judge Weinfeld's opinion in that case was rendered on November 20, 1958, and the final decree was entered on December 19, 1958. Under the Expediting Act the defendants have sixty days after judgment to appeal to the Supreme Court. As yet they have not done so.

There were three basic issues in the *Bethlehem* suit:

1. What were the appropriate "lines of commerce" in terms of products?

2. What were the appropriate "sections of the country" in terms of geographical markets?

3. Was there a reasonable probability that the merger may substantially lessen competition or tend to create a monopoly in any of the appropriate "lines of commerce" in any of the appropriate "sections of the country"?

In determining the appropriate "lines of commerce," Judge Weinfeld, following the Supreme Court's reasoning in the *du Pont-General Motors* case,[5] concluded that lines of commerce are to be determined by the "peculiar characteristics and uses" of the products involved. Applying this test the court found that the evidence justified a finding that the appropriate lines of commerce were the iron and steel industry as a whole and some ten distinct products of the steel industry. He rejected the defendants' contention that all the end products that can properly be produced by one of the basic types of steel mill constitute a single line of commerce without regard to the perculiar characteristics and uses of the individual products.

[4] *United States* v. *Bethlehem Steel Corporation and The Youngstown Sheet and Tube Company,* C. C. H. Trade Regulation Reporter ¶68,189.

[5] *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957).

And finding that there were no "effective substitutes" which compete with the various products constituting the appropriate lines of commerce, Judge Weinfeld concluded that there was no necessity to consider the defendants' contention that the "reasonable interchangeability" test of the *Cellophane* case[6] was applicable in a Section 7 proceeding.

However, Judge Weinfeld did significantly observe that there is a definite distinction between the relevant market in a monopoly case under Section 2 of the Sherman Act and a merger case under Section 7 of the Clayton Act:

> There can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes. The merger of two producers of a product may substantially lessen competition or tend to create a monopoly in the market for that product even though it does not substantially lessen competition or tend to create a monopoly in the broader market embracing all the products which are reasonably interchangeable with that product.

On the second issue, the question of the appropriate "sections of the country," the Court held that the effect of the merger on each of the lines of commerce should be measured not only against the nation-wide market but also against smaller geographical areas where the impact of the merger may be felt. The Court found that the facts would not support the defendants' contention that there are three relevant sections of the country—Eastern, Mid-Continent, and Western. It characterized this tri-partite division of the country as "an obvious gerrymandering of the country to meet the exigencies of this case."

Based on its finding that both Bethlehem and Youngstown each ship substantial percentages of its total shipments into the areas which are the most substantial consuming centers for the industry, the court refused to accept the defendants' proposition that Bethlehem is an "effective competitor" only in the Eastern and Western Areas where its plants are located and that Youngstown is an "effective competitor" only in the Mid-Continent Area where its plants are located. Representative of the findings leading to the conclusion that

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[6] *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

Bethlehem was an effective competitor in the Mid-Continent Area was the fact that Bethlehem's Lackawanna Plant, one of the largest steel mills in the nation, which defendants place in their Eastern Area, shipped almost fifty per cent of its output into the defendants' so-called "Mid-Continent Area."

In support of its conclusion that the nation as a whole is an appropriate section of the country for measuring the anti-competitive effects of the merger, the Court stated:

> While it is true to some extent that there are regional markets for steel products, all of these regional markets are so interrelated that what happens in one has a direct effect in the others and none is so separate that the buyers in one are not concerned with prices and supply and demand in the others.

With respect to the ultimate issue, the question of gauging the merger's competitive impact, the Court, in finding the proposed merger offensive to Section 7 of the Clayton Act, relied upon these factors: (a) the increase in the high degree of concentration already existing in the steel industry; (b) the prior history of mergers and acquisitions by *Bethlehem* and *Youngstown;* (c) the absence of any substantial new entrants in the industry since 1935[7] coupled with the remoteness of the possibility of a new entrant to replace an absorbed Youngstown; and (d) the elimination of substantial actual and potential competition between Bethlehem and Youngstown in the sale of many steel products. This last factor of competition between Bethlehem and Youngstown represented substantial competition not only in terms of dollar volume but also in terms of substantial percentages of total industry sales in the revelant products. Seventy-five per cent of the total sales of both companies, the Court found, represented sales of products produced and sold in common by the two companies.

Judge Weinfeld further held that the merger violated Section 7 by virtue of its vertical aspects. The Court found that the merger would result in the elimination of Youngstown as a substantial source of supply for independent fabricators of the steel products which are the raw materials for the products they sell in competition with

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7 Other than Kaiser Steel Corporation and Lone Star Steel Co., which together account for only 1.6 per cent of total industry ingot capacity.

Bethlehem. Further, the Court found that the independent fabricators would also be deprived of Youngstown as a market for various products which are also produced by Bethlehem but not by Youngstown.

With respect to the issue of "quantitative substantiality," which has been the subject of many legal debates, Judge Weinfeld concluded that it was unnecessary to consider the contentions of the two schools—"quantitative substantiality" and "qualitative substantiality." The arguments centering around these terms, he said, had "become more a battle of words than a search for the correct interpretation of Section 7." With this conclusion I heartily concur. Such labels, I have long felt, are neither helpful analytical concepts in reaching decisions nor in describing a result once reached.

One other significant feature of the opinion should be noted. The defendants contended that any lessening of competition resulting from the merger should be balanced against the benefits to competition that would result from its effect in enhancing the power of Bethlehem to more effectively and vigorously compete with United States Steel. The Court declined to accept this approach, holding as a matter of law that:

> If the merger offends the statute in any relevant market then good motives and even demonstrable benefits are irrelevant and afford no defense.
>
> * * * * *
>
> A merger may have a different impact in different markets—but if the proscribed effect is visited on one or more relevant markets then it matters not what the claimed benefits may be elsewhere.

In construing the statutory phrase "tend to create a monopoly" the Court held that it clearly "includes aggravation of an existing oligopoly situation."

Permitting the proposed merger to go forward, the Court found, would present "an incipient threat of setting into motion a chain reaction of further mergers by the other but less powerful companies in the steel industry."

Judge Weinfeld stated his ultimate conclusion in these words:

> The proposed merger runs afoul of the prohibition of the statute in so many directions that to permit it, is to render section 7 sterile.

In addition to the substantive aspects of the *Bethlehem-Youngstown* case, also significant are the procedures which preceded the decision. Initially, it is to be noted that the trial was concluded within fifteen or sixteen months after issues were joined—a relatively brief span of time as so-called big cases run. Beyond that, the trial itself lasted only nineteen court days. This time sequence, I suggest, is not without importance.

First, completion of trial in slightly over a year after issues were joined highlights the increasing awareness, by bar and bench, of the usefulness of those pre-trial techniques underscored by the *Prettyman Report*. Use of such measures in the *Bethlehem-Youngstown* case saved much judicial time.

Equally important, the ability to bring big cases to trial promptly aids effective enforcement. For antitrust cases, unlike good whiskies, hardly improve with age. I would hope that this pattern of effective use of pre-trial procedures may well lead the way for other courts in the trial of other major antitrust issues.

A second decision of major significance was rendered in the *Maryland-Virginia Milk* case[8] by Judge Holtzoff. In 1956 the United States sued under Clayton Act, Section 7 (as well as Sherman Act, Sections 1, 2 and 3) the Maryland & Virginia Milk Producers Association, a cooperative organization, qualified as such under the Capper-Volstead Act. Following trial, the District Court for the District of Columbia, just a few months ago,[9] held that the Association's acquisition of Embassy Dairy was not immunized by Capper-Volstead and ran afoul the prohibitions of Clayton Act, Section 7.

Since the *Maryland & Virginia Milk* case was the first suit under amended Section 7 against a Capper-Volstead organization, a brief sketch of relevant facts may be helpful. The Co-Op involved controlled the bulk of milk marketed in the Washington metropolitan area. Thus, in the period immediately before the acquisition, the

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9 November 21, 1958.

8 *United States* v. *Maryland & Virginia Milk Producers Association, Incorporated* (Civil, D. D. C.), 1958 Trade Cases ¶69,197.

Co-Op's shipments constituted over eighty-five per cent of all milk required for resale as fluid milk in the market. The acquired firm, Embassy Dairy, representing ten per cent of the market, had dealt for almost twenty years with numerous farmers who preferred to market their milk independent of any cooperative organization. Indeed, some of these farmers operated more than one farm, shipping milk from one farm through the cooperative and from another farm on an independent basis. One such farmer characterized this method of doing business in typical farmer fashion—"I didn't want all my eggs in one basket." Moreover, the firm whose assets were acquired was a vigorous competitor for wholesale and government business—a very substantial factor in the Washington market.

By way of further background, Embassy purchased locally produced milk on a different pricing basis than was employed by the cooperative in the sale of milk to competing dealers. It also obtained less expensive milk from outside the Washington production area. The price advantages inherent in this method of operation made it possible for the firm to obtain a larger volume—in fact, almost fifty per cent—of the business of supplying the substantial requirements of Government installations in the Washington area.

Our investigation developed evidence that the acquisition's goal was to eliminate the acquired firm as an outlet for milk of farmers who were not members of the cooperative and thereby remove nonmember farmers from the market. The Government filed suit under, among other provisions, Clayton Act, Section 7.

After a separate trial on the Section 7 charges, the District Court found that the acquisition tended both to lessen competition and to create a monopoly in violation of Section 7 of the Clayton Act. In its findings of fact, the Court noted the serious adverse consequences of the acquisition upon farmers who did not belong to the cooperative: thus, according to the Court's findings, many of such farmers who had supplied milk to Embassy prior to the acquisition were thereafter unable to find an outlet for their production in the Washington market. So it is that the Court ruled that the cooperative must divest itself of the dairy business acquired in violation of Section 7.

Finally, beyond developments under Clayton Act, Section 7, last year saw two important Supreme Court decisions under the Sherman

Act—*Northern Pacific*[10] and the *Boxing* decision[11] handed down within the last month. In the *Northern Pacific* case the Supreme Court held that tying agreements are per se unreasonable "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." [12]

The facts were these: The Northern Pacific Railway, one of the land grant railroads, owned extensive acreages of land in the Middle and Northwest. Of these millions of acres, much had been sold and leased under tying arrangements. Numerous contracts were executed upon the express condition that products of the land be shipped via the Northern Pacific Railway. The Supreme Court ruled that this tying of transportation to the sale and lease of land was per se a restraint of trade. It found that the undisputed facts established that the defendants by virtue of their extensive land holdings possessed substantial economic power, which it used as leverage to induce large numbers of purchasers and lessees to give preference to Northern Pacific to the exclusion of its competitors.

The significance of the *Northern Pacific* decision lies principally in its qualification of language in the *Times Picayune* opinion,[13] which talks of "monopoly power" or "dominance" over the tying product as a pre-condition of applying the rule of per se unreasonableness to tying arrangements. In the *Northern Pacific* case the Court explained that the use of the terms "monopoly power" and "dominance" over the tying product in the *Times-Picayune* case is not to be construed as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product. It may be that absent other explanations, the ability to impose any "tie" might warrant the conclusion of sufficient market power over the "tying" product to violate Section 1, since the Court said that the "very existence of this host of tying arrangements is compelling evidence" of economic power.

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10 *Northern Pacific Railway Company et al.* v. *United States*, 356 U. S. 1 (1958).

11 *International Boxing Club of New York, Inc.*, 27 Law Week 4055.

12 *Northern Pacific Railway Co. et al.* v. *United States*, *supra*, at p. 6.

13 *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594.

It is now clear that it is necessary in each instance to determine in the light of the particular facts whether there is sufficient economic power to impose an appreciable restraint on free competition over the tied product before the per se rule can apply. But it is equally clear that it is not necessary to meet the more onerous standard of a showing of "monopoly power" or "dominance" over the tied product, which many commentators previously thought to be required by the test of *Times-Picayune*.

Still another aspect of the *Northern Pacific* decision deserves comment. The *International Salt* case[14] was relied upon by the Government to support its contentions in the *Northern Pacific* case. In an effort to avoid the thrust of the holding in that case, counsel sought to distinguish it on the ground that the tying product there was patented while in *Northern Pacific* it was not. The Court rejected this contention. It pointed out that its decision of per se illegality in *International Salt* was reached *not because* a patent was involved, *but in spite of it*. Finally, it concluded that "the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not." [15]

The most recent important development is the *Boxing* opinion of January 12, 1959.[16] You will recall that defendants in that case premised their appeal upon the ground that the relevant market could not properly be limited to include only *championship* boxing contests, but must include *all* professional boxing events. Any boxing contest, they urged, whether championship or not, always involves one ring, two boxers, and a referee. The fighting, they observed, would be done under the same rules before a greater or lesser number of spectators either at the ringside or through the facilities of television, radio, or motion pictures. Therefore, they concluded, the relevant market should include all boxing matches just as it was necessary in the *Cellophane* case[17] to consider all flexible packaging materials rather than cellophane alone.

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[14] *International Salt Co.* v. *United States*, 332 U. S. 392.

[15] *Northern Pacific Railway Co. et al.* v. *United States*, 356 U. S. 1, 11.

[16] *International Boxing Club of New York, Inc. et al.* v. *United States*, 27 Law Week 4055.

[17] *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

A championship boxing match, the Court declared, however, is quite a different thing from a non-championship bout. The Court noted that a determination of a "part of trade or commerce" within the meaning of the Sherman Act "involves distinctions in degree as well as distinctions in kind." While the thought that the relevant market, for purposes of measuring monopoly power under Section 2, may be limited to the "cream" of a business[18] is not new, this decision appears to veer away from *Cellophane*.

These, then, are some of the important developments of the past antitrust year. Just as the shape of the past casts its shadow on the future, so we approach our immediate program with the tools that these new developments have provided.

II.

Against this background of last year's developments, what actions loom on the horizon next year? Discussing next year's program, I would emphasize four essential elements:

First, we shall increasingly emphasize our merger work. Building on precedents of this past year, our merger program should expand. Proceedings under Section 7 may well be an effective tool to prevent undue concentrations of economic power. As the Attorney General's National Committee to Study the Antitrust Laws has stated—a prime goal of antitrust is to "assure . . . some limitation on economic power incompatible with the maintenance of competitive conditions."

To that end, Section 7 may be uniquely suited. Thus, Section 7 may enable the Antitrust Division to present to the courts essential problems of industry structure in more manageable proportions than is true in Section 2, Sherman Act trials. If *Bethlehem-Youngstown* be a guide for trial of future antitrust issues, problems in concentrated industries may be presented to courts and decided in comparatively short periods of time.

Equally important, Section 7 holds promise for more effective relief. Ofttimes not involved under Section 7 is the problem of disrupting established business expectations. Our goal is to inform major companies before the merger is consummated of our interest in the problems it poses. Thus, companies may proceed with more or less full awareness of the legal risks involved. This factor I would

[18] *United States* v. *Paramount Pictures*, 334 U. S. 495 (1948).

expect should do much to encourage courts to grant that divestiture relief which the Clayton Act envisioned, and, indeed, requires.[19]

Second, we recently moved into new phases in several major investigations under the Sherman Act. Some of these investigations had their origin some time ago. We have long been planning means for moving decisively and effectively.

This sort of investigation, I emphasize, is really the other side of the Section 7 coin. By proceeding under Section 7 in newly emerging industries, our aim is to prevent—or at least minimize—the sort of undue concentration that today characterizes certain industries.

Third, apart from the essentially structural problems, we shall continue our focus in those areas of the economy which most significantly influence the cost of living. Here our goal is to insure price flexibility and avoid rigged price rises. Thus, antitrust should make some contribution to the Administration's over-all effort to control inflation and insure reasonable price stability.

Finally, I touch briefly on our program in the so-called criminal area. Here our antitrust work is essentially an adjunct to the task of the Criminal Division of this Department.

Here our effort will be to mesh into this Department's over-all program the antitrust law's unique weapons. Disclosure of details at this point would be premature. Therefore, I will simply note that in the year ahead we should expect our several major investigations touching on racketeering to reach fruition.

III.

So much for a brief sketch for the year ahead. It is impossible in such effort to go further than to generally scan the horizon without indulging in fruitless gazing into the crystal ball. Accordingly, I have focused not on particular cases that may be brought, but rather on the broad outlines of the plans for employing our resources. In this regard, we have the promise of real added help in the present Budget Message. That Budget Message requests a ten per cent increase of this Division's appropriation. If the Congress approves this request, we hope to be able to hire some twenty or so additional attorneys. This augmentation of personnel would, of course, significantly buttress all phases of our contemplated program.

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[19] Clayton Act, Section 11. 15 U. S. C. ¶21.

ANTITRUST NEWSLETTER

Supreme Court (as of June 29, 1959)

[The numbers in brackets are the new docket numbers assigned for the forthcoming 1959-1960 Term.]

Dkt. 45—*Beacon Theatres* v. *Westover* (9th Cir.),*April 8, 1958, petition filed. May 19, 1958, certiorari granted. Argued December 10, 1958. Reversed May 25, 1959.

The Ninth Circuit denied defendant's petition for writ of mandamus to compel the trial court to vacate orders granting the plaintiff's motion to strike defendant's demand for a jury trial on a complaint and answer and directing the issues to be tried to the Court without a jury separate from defendant's counterclaim for damages under the antitrust laws.

The Supreme Court reversed. The Court held that, in an action involving legal and equitable claims, a party could not be deprived of a jury trial as to substantial questions of fact common to both. Writing for a 5-3 majority, Justice Black concluded that the district court's denial of a jury trial to the defendant on his counterclaim and cross-claim both "could not be justified" and hence that mandamus should have been granted.

Justice Stewart, dissented, Justices Harlan and Whittaker concurring. The minority was of the opinion that mandamus was not available.

Dkt. 252—*Safeway Stores Inc.* v. *Oklahoma Retail Grocers Assn.* (Sup. Ct., Okla.), appeal filed August 4, 1958. Jurisdiction noted October 13, 1958. Argued May 19, 1959. Affirmed June 22, 1959.

The Oklahoma Supreme Court held that a retail grocery chain violated the Oklahoma Unfair Sales Act when it sold groceries at prices below the minimum statutory clause so as to meet the alleged

reduced prices of competitors who were giving trading stamps with the purchase of groceries. Safeway contended that the Oklahoma Act violated the United States Constitution.

In affirming, the Supreme Court held that the distinction between sales below "cost" on the one hand, and "cash discounts" resulting from the use of trading stamps on the other hand, which the Oklahoma court made in its interpretation of the Unfair Sales Act was "reasonable" and was not violative of the equal protection of the laws principle. "There is no constitutional right to employ retaliation against action outlawed by a State." Because not raised below, the Court refused to consider the issue of whether Oklahoma law had been pre-empted by federal antitrust laws.

Dkt. 406—*Federal Trade Commission* v. *Simplicity Pattern Co.* (D. C. Cir.), petition filed September 26, 1958. Argued April 21, 1959. Affirmed June 8, 1959.

The FTC appealed from the circuit court's ruling that the FTC order should be set aside because the manufacturer had not been given the opportunity to present evidence of cost justification to dispel the charge of unlawful discrimination in violation of Section 2(e) of the Clayton Act.

Writing for a unanimous court, Justice Clark held that "neither 'cost-justification' nor an absence of competitive injury may constitute 'justification' of the prima facie Section 2(e) violation."

Dkt. 447 was a companion case.

Dkt. 489—*Pittsburgh Plate Glass Co.* v. *United States* (4th Cir.), petition for certiorari granted December 15, 1958. Argued April 28, 1959. Affirmed June 22, 1959.

The petition for certiorari was limited to the single question: "In the trial of a federal criminal action, when the principal witness for the prosecution stated that he had testified three times before the indicting grand jury upon matters covered by his testimony at the trial, was it reversible error for the trial judge upon motion duly made to deny to the defendants for use of cross examination, inspection of the transcripts of the grand jury testimony of the witness?"

The Supreme Court answered the question in the negative. Writing for the majority in a 5-4 decision, Justice Clark held that the defen-

dants had failed to show that "a particularized need" existed for the production of the grand jury minutes which outweighed the policy of secrecy. He held that no such particularized need had been shown but rather only a generalized claim of "right." Chief Justice Warren, and Justices Black and Douglas joined Justice Brennan in the dissent—"but the court pays only lip service to this principle . . . " The dissenters were of the opinion that Pittsburgh had "particularized" its need and that no valid considerations existed in favor of grand jury secrecy. The minority was of the opinion that defendant's motion for the production of that portion of the grand jury material which consisted of the witness' testimony on subjects he had testified to during the trial should have been granted.

Dkt. 552 [Dkt. 12]—*Minneapolis & St. Louis Railway Co.* v. *United States* (165 F. Supp. 893, D. C. Minn.), appeal filed December 1, 1958. Probable jurisdiction noted March 9, 1959.

The acquisition of a railroad by two other railroads was held not to violate Section 7 of the Clayton Act or Section 1 of the Sherman Act where the ICC had concluded that any adverse effects on competition were far outweighed by other facts in the public interest.

Among the questions presented is whether the antitrust considerations present in the case required the Court to reject the Commission's order.

Dkts. 620 [27] and 633 [28] are companion cases.

Dkt. 567 [Dkt. 20]—*United States* v. *Parke-Davis & Co.* (164 F. Supp. 827, D. D. C.), appeal filed December 10, 1958. Probable jurisdiction noted February 24, 1959.

The district court dismissed a civil action charging a conspiracy to maintain resale prices and to boycott retailers who refused to enter into the alleged conspiracy. The appeal should include an elaboration by the Supreme Court of the doctrine enunciated by the *Colgate* case.

Dkt. 620 [Dkt. 27]—*State of South Dakota* v. *United States of America and ICC* (165 F. Supp. 893, D. C. Minn.), appeal filed January 2, 1959. Probable jurisdiction noted March 9, 1959.

This is a companion case to Dkts. 552 [12] and 633 [28].

Dkt. 633 [Dkt. 28]—*State of Minnesota* v. *United States of America and ICC* (165 F. Supp. 893, D. C. Minn.), appeal filed January 8, 1959. Probable jurisdiction noted March 9, 1959.

This is a companion case to Dkts. 552 [12] and 620 [27].

Dkt. 836 [51]—*Federal Trade Commission* v. *Travelers Health Association* (262 F. 2d 241, 8th Cir.), petition filed April 13, 1959. Certiorari granted May 18, 1959.

The Court below held that the McCarran-Ferguson Insurance Regulation Act deprived the FTC of jurisdiction to control the mail order advertising practices of a company licensed by and located in Nebraska.

The question presented is whether the Act deprived the FTC of jurisdiction to prohibit unfair and deceptive practices by an insurance company doing an interstate business solely by mail, where the state in which it is incorporated and maintains its home office prohibits unfair or deceptive practices in the insurance business there or "in any other state."

Dkt. 887—*Webster Rosewood Corp.* v. *Schine Chain Theatres* (2d Cir.), petition filed May 4, 1959. Certiorari denied June 15, 1959.

In dismissing the case, the district court refused to admit in evidence the 1946 government decree because it related to a period of time other than that alleged by the plaintiff to have been germane in the instant action. Judge Hand affirmed this ruling and also concurred in the district court's holding that there had been no proof that the plaintiff had made a demand upon the defendant distributors for a first run zone.

Dkt. 895 [61]—*Federal Trade Commission* v. *Henry Broch & Co.* (261 F. 2d 725, 7th Cir.), petition filed May 6, 1959. Certiorari granted June 15, 1959.

The Court below set aside an order of the FTC which required Broch to cease and desist from granting a portion of the brokerage fee to which he was entitled from his principal seller to one of his buyers. Broch had accepted a 3% rather than the usual 5% commission from a seller in order to effect a sale to a buyer at a lower price. The Circuit Court held that neither the language of Section

2(c) of the Clayton Act nor its legislative history indicated that a seller's broker was covered by this section of the Act.

Dkt. 898 [62]—*Maryland & Virginia Milk Producers Ass'n* v. *United States* (168 F. Supp. 880; 167 F. Supp. 45 and 799, DDC), appeal filed May 8, 1959. Probable jurisdiction noted June 29, 1959.

The Court below held that the statutory immunity accorded to agricultural cooperatives did not apply in respect to transactions entered into between it and other organizations. Accordingly, the acquisition by the cooperative of one of its principal competitors constituted a foreclosure which was unreasonable *per se* and a violation of Section 3 of the Sherman Act.

Dkt. 942 [73] is a companion case.

Dkt. 942—*United States of America* v. *Maryland & Virginia Milk Producers Ass'n* (DDC), appeal filed May 22, 1959. Probable jurisdiction noted June 29, 1959.

This is a companion case to Dkt. 898.

Dkt. 933—*Allied Newspaper Carriers of New Jersey* v. *The Evening News Publishing Co.* (3d Cir.), petition filed May 20, 1959. Petition denied June 29, 1959.

The Circuit Court affirmed the District Court's ruling that defendants' refusal to distribute plaintiff's paper until its use of newsboys was discontinued constituted a group boycott, illegal *per se*. The Court held that the distribution of a complete newspaper, including advertising, involved interstate commerce and, intentions or purposes notwithstanding, defendants' activities unduly restrained a substantial amount thereof.

Dkt. 953—*Bedno* v. *Fast* (Sup. Ct., Wisc.), petition filed May 26, 1959. Petition denied June 29, 1959.

The Wisconsin courts held that a state statute prohibiting the advertising of the prices of glasses was applicable to the plaintiffs in a declaratory judgment action and that it was constitutional. Noting that the state statute related to truthful advertising, the Wisconsin courts rejected the contention that Section 12 of the FTC Act, which relates only to false advertising, had preempted this field.

Dkt. 964 [84]—*Mohawk Refining Corp.* v. *FTC* (263 F. 2d 818, 3d Cir.), petition filed May 29, 1959.

The Commission entered and the Circuit Court affirmed a cease and desist order requiring the petitioners to affirmatively disclose that its lubricating oil was processed from "used" oil. Adopting the rationale of the *Algoma Lumber* case, the Circuit Court held that the public had a right to purchase "new" oil if it so desired, and that a manufacturer might not "surreptitiously" substitute another product even though there was no quality differential.

Some four months after the termination of the hearings, petitioners made a formal motion for the production of correspondence between the Commission and witnesses who had appeared on its behalf on the factual issue as to whether or not the public had a preference for new as opposed to used oil. The Commission denied the motion and the Circuit Court held that good cause had not been made out.

Dkt. 1011 [125]—*Double Eagle Refining Co.* v. *FTC* (265 F. 2d 246, 10th Cir.), petition filed June 18, 1959.

The facts of this case are substantially similar to those in the *Mohawk Refining* case, *supra.* In the instant case, Circuit Judge Breitenstein dissented on the ground that the record was devoid of evidence that the consuming public had a preference for "virgin" oil—the ultimate fact from which the Commission's finding of "deception" was inferred. He also observed that unlike the *Algoma Lumber* case, relied on by the majority in this case and in the *Mohawk Refining* case, mislabelling was not involved. The crux of the dissent was that non-disclosure alone did not amount to deception and that the Commission's order requiring disclosure was without legal basis.

Other Courts

Becker-Lehmann, Inc. v. *The Firestone Tire and Rubber Co., et al.* (U. S. D. C. E. D. Mo., E. Div., May 28, 1959).

Separate agreements under which oil companies agreed to promote and aid a manufacturer in selling its tires, batteries and accessories to the companies' service station operators in return for a commission did not support an auto product distributor's claim that the oil companies and the manufacturer conspired to restrain and

monopolize trade in violation of the Sherman Act. On this claim, the oil companies and manufacturer are granted summary judgments; however, the manufacturer's motion for a summary judgment on a price discrimination charge is denied. Also, the oil companies are granted summary judgments on a charge that they violated the brokerage commission provision of the Robinson-Patman Act.

Royster Drive-In Theatres, Inc. v. *American Broadcasting-Paramount Theatres, Inc., et al.* (C. A. 2d Cir., June 8, 1959).

A conspiracy between motion picture distributors and an exhibitor to withhold the more desirable films from a competing exhibitor was terminated when that competitor "demanded and was accorded the right to bid competitively" for such films. A competitive bidding system, although it might tend to raise costs for all competitors and place a premium on financial resources, is clearly valid so long as each theatre can bid in an atmosphere of free and open competition and rentals are reasonable. In addition, however, the competing exhibitor's treble damage action is defeated by its failure to demand those more desirable films from the distributors.

Affiliated Music Enterprises, Inc. v. *Sesac, Inc.* (U. S. D. C. S. D. N. Y., June 8, 1959).

A treble damage action charging a licensor of performance rights in musical compositions with monopolizing the market for the acquisition of such rights in "gospel music" was properly dismissed. That music was distinct from other music and was without substitutes which would equally satisfy its devotees; therefore, it was properly found to be the relevant market. However, there was a lack of evidence as to the proportion of currently valuable performance rights owned by the company or its position in the market it was alleged to have monopolized. Also, there was no showing that the company had the power to control prices or exclude a competitor, or that its practices had injured the plaintiff.

Howard Industries, Inc. v. *Rae Motor Corp.* (C. A. 7th Cir., May 27, 1959).

A motor manufacturer's agreement to use a "casing" for its motors that was different in design from that used by a competitor, and a trial court's injunction enforcing that agreement, do not unlawfully extend the competitor's patent monopoly on a "motor brush

assembly" so as to constitute a restraint of trade or a tendency to create a monopoly in violation of the Sherman Act or the Wisconsin antitrust statute.

Reines Distributors, Inc. v. *Admiral Corporation, et al.* (U. S. D. C. S. D. N. Y., June 9, 1959).

A Delaware corporation engaged in financing distributors and dealers in household appliances, although qualified to do business only in Illinois, is properly sued in the Federal District Court for the Southern District of New York because it is "transaction business" there. Documents instituting credit transactions were executed in New York and the corporation, among other things, borrows extensively in the state and maintains substantial deposits in the banks there. Also, the corporation was properly served with process at its headquarters in Chicago, a place where it was an "inhabitant" or was "found."

McClymonds, et al. v. *Braudle, et al.* (U. S. D. C. E. D. Mo., E. Div., March 17, 1959).

Two corporations, in a treble damage action charging motion picture film, are required to submit to the taking of their depositions through two individuals who were formerly officers and directors of the corporations.

Independent Productions Corp. and IPC Distributors, Inc. v. *Loew's, Inc., et al.* (U. S. D. C. S. D. N. Y., May 20, 1959).

A Federal District Court, rejecting an argument that an unfair competition action should be removed to the court because the state court in which it was filed did not have jurisdiction over the federal patent and antitrust matters raised in the defendants' counterclaim, remands the case to the state court because the complaint did not, on its face, establish federal jurisdiction.

Leo Feist, Inc., et al. v. *The Lew Tendler Tavern, Inc., et al.* (C. A. 3rd Cir., June 5, 1959).

A trial court properly rendered judgment against infringers of music publishers' copyrights without deciding whether or not the publishers had violated the antitrust laws. In their answer, the infringers charged the publishers with conspiring to monopolize the

field of musical publications but offered no evidence in support of that allegation.

Scapa Dryers, Inc. v. *Abney Mills* (C. A. 5th Cir., June 30, 1959).

An agreement making a textile manufacturer the exclusive user in the United States of patented "looms," devices used in the paper making industry, would be invalid under the antitrust laws if the exclusive use were "in perpetuity." Including the entire United States as the territory for which the exclusive use was granted is not unreasonable because the patentee agreed to assign its United States patents to the manufacturer. However, the agreement would be invalid if the parties intended the exclusive use to be one of perpetual duration.

Poller v. *Columbia Broadcasting System, Inc., et al.* (U. S. D. C. D. C., filed June 12, 1959).

An assignee of the owner of a television station failed to state a cause of action under the antitrust laws by alleging that a broadcasting system cancelled a contract to supply his station with "shows" and purchased a competitor's station rather than his. A plaintiff in a private action must establish that he was injured by the defendant's violation of the antitrust laws. Here, the plaintiff was injured because the cancellation of the contract lessened the value of his station; however, that loss was not caused by a violation of the antitrust laws but by the broadcasting system's exercise of its cancellation right under the contract and its exercise of the right to select those with whom it would deal or refuse to deal.

Dallas Farm Machinery Co. v. *Minneapolis Moline Co., et al.* (Tex. Ct. App., May 1, 1959).

In an action charging a farm machinery manufacturer with violating a dealership agreement, the court notes that if the agreement gave the dealer the exclusive right to sell the manufacturer's products in a designated territory, it would violate the Texas antitrust laws. Also, the dealer has no right of action on its charge that it was induced to enter into such an agreement by fraud; since the courts will not grant relief to either of the parties to a contract that violates the law. The fraudulent inducement charge would be defeated by the antitrust illegality of the agreement.

Department of Justice Activity

U S. v. *Ciba Company, Inc., et al.* (U. S. D. C. S. D. N. Y., Consent judgment, July 9, 1959).

Attorney General William P. Rogers announced the entry in the Federal District Court in New York City of an antitrust consent judgment enjoining violations of the Sherman Antitrust Act in connection with the sale of dyestuffs. Consenting to the entry of the judgment were Ciba Company, Inc., Geigy Chemical Corporation and Sandoz, Inc. all of New York City and Toms River-Cincinnati Chemical Corporation of Cincinnati, Ohio.

The Government's complaint which was filed in this case on May 29, 1958 charged that Ciba, Geigy and Sandoz are wholly owned by three foreign manufacturers of dyestuffs located in Switzerland and that Toms River is jointly owned by the same three foreign manufacturers. Ciba, Geigy and Sandoz purchased approximately 60% of their requirements of dyestuffs from Toms River. The complaint alleged that the defendants devised a plan to maintain and stabilize the prices at which Ciba, Geigy and Sandoz would resell dyestuffs manufactured by and sold to them by Toms River.

The judgment entered enjoins the defendants from agreeing among themselves or with any other person to fix prices for the sale of dyestuffs manufactured in the United States to third persons. In addition Ciba, Geigy and Sandoz are enjoined from disclosing to each other their selling prices on dyestuffs prior to the time such prices are announced to the trade generally. Defendant Toms River is enjoined from serving as a conduit for the other defendants for information as to the prices at which any of them propose to sell dyestuffs. Toms River is further enjoined from suggesting or attempting to suggest the price at which dyestuffs shall be sold to any third person and from selling or offering to sell dyestuffs at a discount or rebate from retail price lists.

U. S. v. *Brunswick-Balke-Collender Co., et al.* (U. S. D. C. E. D. Wis., Indict., July 13, 1959).

Attorney General William P. Rogers announced the filing of a two-count antitrust indictment in the United States District Court for the Eastern District of Wisconsin, charging illegal trade restraints in the sale and distribution of folding gymnasium bleachers.

It was alleged that, beginning in or about 1954, the defendants have engaged in a combination and conspiracy to restrain and to monopolize interstate commerce in folding gymnasium bleachers, in violation of the Sherman Antitrust Act. Pursuant to the alleged combination and conspiracy, it was charged, the defendants agreed:

(a) to allocate among themselves business in folding gymnasium bleachers;

(b) to adopt uniform base prices, terms, and conditions of sale for such bleachers;

(c) to submit to prospective purchasers bids calculated according to certain agreed upon formulae; and

(d) to retain defendant Corray as a consultant, to coordinate the activities of the defendant corporations.

Thus, it was alleged, competition in sales of folding gymnasium bleachers has been artificially restricted, and prices have been fixed at arbitrary levels.

U. S. v. *Kennecott Copper Corp.* (U. S. D. C. S. D. N. Y., Complaint, June 22, 1959).

Attorney General William P. Rogers announced the filing in the United States District Court for the Southern District of New York of a civil antitrust complaint charging that the acquisition by Kennecott Copper Corporation of the assets of the Okonite Company may substantially lessen competition or tend to create a monopoly, in violation of Section 7 of the Clayton Act.

Kennecott is the largest domestic producer of copper. In 1958, Kennecott had total revenues of $404,998,000 and net income of $60,121,000. Its consolidated assets as of December 31, 1958 were $825,677,738. Kennecott's mines yielded about 35% of total domestic copper production between 1955 and 1957. Kennecott ranks first in smelting capacity among domestic companies with about 30% of total estimated national capacity and in 1959 it will have about 20% of industry capacity for the electrolytic refining of copper. Prior to the acquisition of Okonite, Kennecott was also engaged in the fabrication of copper and copper-base products through two wholly-owned subsidiary fabricating companies: Chase Brass & Copper Company, Inc. and Kennecott Wire and Cable Company.

both of which were originally acquired by Kennecott. Chase fabricates a wide variety of copper, brass and other copper-base alloy mill products. Kennecott Wire and Cable produces copper rods and manufactures copper wire and cable.

Okonite was one of the largest and most technically advanced independent fabricators of wire and cable prior to the acquisition. In 1957 Okonite had sales of over $40,000,000 and as of August 31, 1958, it had assets of over $30 million. Okonite purchases about 12,000 tons of copper per year. The acquisition of Okonite in November 1958, according to the complaint, will enable Kennecott to increase materially the internal consumption of copper by its fabricating facilities.

The suit alleges that concentration in copper production has resulted in large part from mergers and acquisitions by all of the leading copper producing companies and that the integration by the major producers into copper fabrication has been achieved almost entirely by acquisition. In fact, 70% of the long-term growth, between 1915 and 1945, of the three largest domestic copper producers has been due to acquisitions and mergers, a prominent consideration in the decision of Congress to strengthen Section 7 of the Clayton Act in 1950. Moreover, the copper industry has exhibited a growing trend toward the absorption of fabricating companies by producers.

The suit charges that the effect of Kennecott's acquisition of Okonite eliminates actual and potential competition between Kennecott and Okonite in the fabrication and sale of various kinds of copper wire and cable, enhances Kennecott's competitive advantage over other copper producers and wire and cable fabricators, and may substantially lessen competition in the production and sale of copper, copper and copper-content products, and copper wire and cable. It is further charged that the acquisition may foster mergers and acquisitions by other copper producing companies and copper fabricating companies with a consequent increase in economic concentration and tendency toward monopoly in the copper industry.

The suit seeks, among other things, to force Kennecott to divest itself of the assets and business of Okonite and to prevent it from acquiring other companies engaged in the production, fabrication or sale of copper or related products.

U. S. v. *International Brotherhood of Teamsters, Union #142, et al.* (U. S. D. C. N. D. Ind., Indict., June 22, 1959).

Attorney General William P. Rogers announced that a teamsters' union local, a trade association and four individuals had been indicted in Hammond, Indiana for conspiracy to restrain interstate commerce in gasoline in violation of Section 1 of the Sherman Antitrust Act.

The union indicted was the General Drivers, Warehousemen and Helpers Union No. 142, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. The trade association indicted was the Gasoline Retailers Association, Inc., an association of gasoline station operators, located in Gary, Indiana.

Acting Assistant Attorney General Robert A. Bicks, in charge of the Antitrust Division, pointed out that the indictment charges that beginning about 1954, and up to the present time, the defendants, together with other gasoline station operators, engaged in a combination and conspiracy to stabilize retail gasoline prices in Lake County, Indiana and Calumet City, Illinois, in violation of the Sherman Act.

The conspiracy, according to the indictment, consisted of an agreement under which: (1) major brand and independent brand gasoline station operators would refrain from advertising, requiring, or permitting the giving of premiums in connection with retail gasoline sales; and (2) major brand gasoline station operators would refrain from advertising the price for the retail sale of gasoline, other than as such price is included as a part of the price computing mechanism constituting a part of any pump or dispensing device.

In enforcing the alleged conspiracy, the indictment charges that the defendants picketed and threatened to picket, and cut off and threatened to cut off the delivery of gasoline to, those gasoline station operators who did not comply with the terms of the agreement.

According to the indictment, the conspiracy had the effect of stabilizing retail gasoline prices in the area and of eliminating price competition among gasoline retailers who participated in the agreement.

U. S. v. *Standard Oil Company of California, et al.* (U. S. D. C. S. D. Calif., Consent judgment, June 19, 1959).

Attorney General William P. Rogers announced termination as to all except one defendant of an antitrust case against the major

oil companies on the West Coast, entitled *United States* v. *Standard Oil Company of California et al.*, pending since 1950 in the Federal Court for the Southern District of California.

The termination was by entry of a consent judgment signed by the Government and six defendants, and approved by United States District Judge James M. Carter. The consenting defendants are Standard Oil Company of California, Shell Oil Company, Richfield Oil Corporation, General Petroleum Corporation, Tidewater Oil Company and Union Oil Company of California. One defendant, Texaco Inc., was not party to the judgment and the case remains to be tried as to this company.

The judgment relates to the activities of the consenting defendants in the States of California, Washington, Oregon, Nevada and Arizona and remains in effect for fifteen years. Among its provisions are the following:

> A requirement that each consenting defendant for a period of ten years shall offer to each dealer to which it supplies its branded products a supply contract having a minimum term of three years;
>
> A requirement that each such defendant for a period of ten years shall offer to each dealer who leases premises from the defendant a lease agreement having a minimum term of three years;
>
> An injunction against any consenting defendant entering into or enforcing any agreement with a reseller (one who buys for resale as distinguished from one who sells on a consignment basis) that he will resell any petroleum product at a price designated by such defendant, and from forcing any reseller, by threat of cancellation or non-renewal of a lease or supply contract, to resell any petroleum product at a price designated by such defendant;
>
> An injunction against entering into any agreement with a reseller dealer, or from making sales to any dealer on a condition, that the dealer shall purchase from such defendant all or substantially all of the dealer's requirements of any refined petroleum product or TBA product (tires, batteries and accessories), or that the dealer shall not sell or handle petroleum products or TBA items obtained from other persons;

An injunction against agreement with any other defendant to control production of crude oil with the objective of fixing prices for crude oil or petroleum products, and against membership or participation in any organization which sponsors, recommends, or carries out any program for control of crude oil production with that objective;

An injunction against agreements among defendants to fix prices to be paid for crude oil or to be charged for refined petroleum products;

An injunction against agreements among defendants to adopt or pursue any continuing system or practice of granting discriminatory treatment to defendants compared with nondefendants, or to boycott any nondefendants, with respect to agreements to exchange crude oil or petroleum products or agreements for the use of pipelines or other facilities for the transportation, storage or loading of crude oil or refined petroleum products;

An injunction against entering into or renewing contracts for the purchase of crude oil for longer than one year unless the contracts contain a provision giving the seller the right to terminate upon a notice of not more than one year in contracts involving less than 2,000 barrels per day, and a notice of not more than five years in the case of contracts involving more than 2,000 barrels per day.

The judgment recites that the consent of the Government is conditioned upon the fact that the judgment shall not constitute any bar or estoppel to any litigation which may hereafter be brought by the Government for activities occurring after the entry of the judgment, or for acts of any defendant individually or in conjunction with any nondefendant, or for acts of two or more defendants not within the scope of the charges in the Government's complaint instituting the action. The judgment further recites that the consent of the defendants is conditioned upon the fact that it shall operate as an estoppel and bar to any litigation instituted by the Government based on or alleging any conspiracy, agreement or monopolization which was charged in the amended complaint, or continuation of any such conspiracy, agreement or monopolization, or continuation of its effects.

The judgment details the actions by the court which preceded agreement of the Government and the consenting defendants:

"At a pre-trial hearing on March 14, 1957, the Court referred to the arguments of defense counsel that, while they denied defendants had done anything wrong, they also contended that methods of operation and conditions in the petroleum industry in the Pacific States Area had substantially changed since the filing of the complaint. After referring to the lengthy and expensive trial that would be involved, the Court asked if the parties had ever discussed the possibility of settlement. The Court was advised that there had been such discussions with some defendants but they had been abandoned because of impossibility of reaching any agreement due to plaintiff's insistence on a prohibition against retail selling by defendants, as prayed for in Prayer 17 of the amended complaint. The Court urged plaintiff and defendants to meet to explore the possibility of settlement of all or some of the issues.

* * * * *

"During 1957 several such meetings were held, but at a pre-trial hearing on December 17, 1957, the Court was informed that discussions of possible settlement had again broken down because, among other things, of defendants' rejection of plaintiff's continuing demand that each defendant be enjoined from engaging in the business of selling refined petroleum products at retail, either through its own employees or by other persons designated as agents, consignees or managers, as prayed for in Prayer 17.

* * * * *

"On May 29, 1958, the defendants filed a proposal that the Court consider, in the light of events occurring since the filing of the complaint, trying issues of mootness and relief before the issue of law violation. After a hearing on this proposal in July 1958, the Court deferred a ruling on such proposal, and expressed a desire to explore the type of relief that could be granted to plaintiff under Prayer 17 of the amended complaint. In Prayer 17, plaintiff sought 'divestiture' and 'divorcement,' defining divestiture as a requirement that defendants divest themselves of all right, title and interest, whether owner-

ship, leasehold or other proprietary interest, in service stations and other retail outlets and that they not be permitted to acquire any in the future; and defining divorcement as a requirement that the defendants now engaged in the business of selling refined petroleum products at retail either through their own employees or by agents, consignees or managers, should cease such business and that no defendant be permitted to engage in such business in the future.

"The Court directed plaintiff to submit a statement setting forth in some detail the relief sought under Prayer 17 and the reasons therefor. The Court directed defendants to present their views, together with information concerning the existing situation compares to that in 1950 with respect to numbers of service stations; their locations; their relationship to suppliers, the names and numbers of nondefendants refiners and marketers; the number of stations handling their products; the areas in which they operate; the length of leases; and such other data as would give to the Court an over-all picture of present marketing of refined petroleum products compared to that existing when the complaint was filed. The requested showing was to be by statement of counsel and not by way of taking of testimony, and as far as possible as an agreed presentation of the parties. All of these matters would be presented and considered on the assumption that the case had been tried on the issue of whether the antitrust laws had been violated by the defendants prior to the commencement of the action on May 12, 1950, and that the Court had found that violation had occurred. The Court announced as its purpose an effort to determine whether, on the basis of such an assumption, the Court would grant all or part of the relief sought by plaintiff in Prayer 17.

"Written statements and presentations were made at a pretrial hearing on October 28 to 31, 1958, pursuant to the Court's direction. At that hearing plaintiff generally conceded the accuracy of the showing made by counsel for defendants as to post-complaint data, as far as it went.

"The Court stated that defendants had made a substantial showing of competition in marketing since 1950, both as between

defendants and with new marketers entering the Pacific Coast Area since 1950 and with others; and that it was unlikely, on the basis of plaintiff's evidence as to activities of defendants occurring since 1950 and the situation existing at the present time, that plaintiff would now file a suit making those charges contained in the amended complaint herein.

"On the basis of the written statements, presentations and oral arguments made during said hearing, which were not as a part of trial or the taking of testimony, the Court ruled that even if at the trial of the case it should be proved to the Court's satisfaction that the defendants had violated the law prior to May 12, 1950, the Court should not and would not grant divestiture or divorcement or relief beyond the type within the area of which the relief herein embodied falls.

"The Court then again urged defendants to consult with plaintiff to see whether, in view of the foregoing ruling, further progress could be made toward disposing of all or part of this litigation. Plaintiff was charged with responsibility for arranging conferences with defendants concerning settlement. Such conferences were held and the within decree resulted."

U. S. v. *Firestone Tire and Rubber Co.* (U. S. D. C. W. D. Tenn., Indict., June 24, 1959).

Attorney General William P. Rogers announced that a federal grand jury in Memphis, Tennessee, returned an indictment charging Firestone Tire and Rubber Company with a violation of Section 1 of the Sherman Antitrust Act. The indictment alleges that Firestone conspired with numerous distributors, syndicates, manufacturers, and retail stores, described in the indictment as co-conspirators, to fix minimum retail prices for foam mattresses and "combinations" identified as containing a component Firestone product. The indictment defines "combination" as a "mattress and a foundation manufactured as a set to match each other and to be sold together."

Acting Assistant Attorney General Robert A. Bicks of the Antitrust Division, pointed out that Firestone is described in the indictment as one of the seven major producers of fillers made of latex foam or synthetic foam. Firestone manufactures fillers at its factory in Fall River, Massachusetts, but does not manufacture completed mattresses for sale commercially, nor does it manufacture foundations.

It is alleged that during the period 1951-1957 Firestone sold fillers having an aggregate wholesale value exceeding $33,000,000; that the retail value of foam mattresses made from such fillers exceeded $75,000,000; and that the retail value of combinations including foam mattresses made from such fillers exceeded $140,000,000.

The indictment charges that Firestone and the co-conspirators agreed that Firestone fix minimum retail prices for foam mattresses and combinations; that co-conspirator retail stores adhere to such prices and refrain from advertising or otherwise displaying such mattresses and combinations at lower prices; that Firestone and co-conspirator distributors and manufacturers induce retail stores not to sell such mattresses and combinations at lower prices; that Firestone and co-conspirator distributors and syndicates induce manufacturers not to sell and co-conspirator manufacturers refuse to sell such mattresses and foundations to retail stores who sell them or advertise them at lower prices; and that Firestone and co-conspirator distributors refuse to sell fillers to manufacturers whose retail customers sell or advertise such mattresses and combinations at lower prices.

It is alleged in the indictment, as effects of the conspiracy, that price competition in the sale of mattresses and combinations identified as containing component Firestone products has been restrained; that retail stores and manufacturers have been restrained from advertising such mattresses and combinations at prices lower than those fixed by Firestone; that manufacturers and distributors have been deprived of the right to sell such mattresses and combinations to customers of their own selection; and that consumers of such mattresses and combinations have been deprived of the benefit of free and open competition.

U. S. v. *Brunswick-Balke-Collender Co., et al.* (U. S. D. C. E. D. Wis., Complaint, July 30, 1959).

Attorney General William P. Rogers announced the filing of a civil complaint in the United States District Court for the Eastern District of Wisconsin, charging Sherman Antitrust Act violations in the sale and distribution of folding gymnasium bleachers.

This civil complaint is a companion suit to a recent criminal indictment against members of this industry, and the charges in the complaint are similar to those in that indictment. It is alleged that

the defendants have engaged in an illegal combination and conspiracy to restrain and to monopolize interstate commerce in folding gymnasium bleachers, by agreeing:

(a) to allocate among themselves business in folding gymnasium bleachers;

(b) to adopt uniform base prices, terms, and conditions of sale for such bleachers;

(c) to submit to prospective purchasers bids calculated according to certain agreed upon formulae; and

(d) to retain defendant Corray as a consultant, to coordinate the activities of the defendant corporations.

U. S. v. *Arizona Consolidated Masonry & Plastering Contractors Ass'n, et al.* (U. S. D. C. Ariz., Indict., June 2, 1959).

Attorney General William P. Rogers announced that a federal grand jury sitting in Phoenix, Arizona indicted the Arizona Consolidated Masonry and Plastering Contractors Association, a trade association of masonry and plastering subcontractors, and officers or directors of the Association, all of Phoenix, in a single count indictment charging a violation of the Sherman Antitrust Act in connection with the sale and installation of masonry and plastering materials.

The indictment charges that since 1951 the defendants have engaged in a conspiracy to: (a) boycott general contractors who do not limit their masonry and plastering contract awards to members of the Association; (b) refuse to hire masons or plasterers who work for non-cooperating general contractors; (c) adopt and enforce bidding rules which unreasonably restrict the making of bids by subcontractors and the receipt of bids by general contractors; and (d) interfere with bid quotations submitted by subcontractors.

A companion civil antitrust complaint was also filed against these same defendants, alleging the same Sherman Act violation as charged in the indictment. The civil suit seeks injunctive relief designed to restore competitive conditions in masonry and plastering subcontracting work in Arizona.

It is alleged in the indictment and complaint that the value of masonry and plastering subcontracts in Arizona amounted to about $5,650,000 in 1958, and that the members of the Association perform

approximately 75 per cent of these subcontracts. Thus, the restraints alleged in these cases adversely affect the business of small builders and independent general contractors, who have been precluded from bidding on masonry and plastering work.

U. S. v. *U. S. Rubber Co.* (U. S. D. C. E. D. Col., Indict., June 23, 1959).

Attorney General William P. Rogers announced that a federal grand jury in Denver, Colorado returned an indictment charging the United States Rubber Company [U. S. Rubber] with a violation of Section 1 of the Sherman Antitrust Act. The indictment charges that U. S. Rubber conspired with numerous distributors, assemblers, suppliers, and retail stores, designated in the indictment as co-conspirators, to eliminate retail price competition in the sale of mattresses and "ensembles" identified by the trademark or trade name of U. S. Rubber. The indictment describes an "ensemble" as a mattress and a foundation in combination. A foundation is that "part of the bed supporting the mattress, sometimes called the 'box springs.' "

The indictment charges that U. S. Rubber is one of the seven major domestic producers of mattress fillers made of latex foam or synthetic foam. It is stated in the indictment that "during the years 1953 through 1957, U. S. Rubber sold more than 450,000 Koylon mattresses having a wholesale value exceeding $18,500,000, more than 290,000 foundations having a wholesale value exceeding $7,900,000, and more than 200,000 blanks, having a wholesale value exceeding $5,000,000. The retail value of such mattresses, foundations and blanks exceeded $55,000,000."

The indictment charges that U. S. Rubber and the co-conspirators agreed that U. S. Rubber fix minimum retail prices for Koylon mattresses and ensembles, and for mattresses and ensembles produced by assemblers and identified by a trademark or trade name of U. S. Rubber; that co-conspirator retail stores adhere to such prices and refrain from advertising such mattresses and ensembles at lower prices; that U. S. Rubber and co-conspirator distributors and assemblers induce retail stores not to sell or advertise such mattresses or ensembles at lower prices; that U. S. Rubber and co-conspirator distributors induce assemblers not to sell, and co-conspirator assemblers refuse to sell, such mattresses and ensembles at lower

prices; and that U. S. Rubber and co-conspirator distributors refuse to sell blanks to assemblers who produce and sell such mattresses and ensembles to retail stores who sell or advertise them at lower prices.

U. S. v. *Bitz, et al.* (U. S. D. C. S. D. N. Y., Indict., June 23, 1959).

Attorney General William P. Rogers announced that through a coordinated effort of the Antitrust Division and the Criminal Division, eleven individuals and one corporation were indicted in New York City for violations of the Sherman Antitrust Act and the Hobbs Anti-Racketeering Act in connection with the wholesale distribution of newspapers and magazines in the metropolitan New York area.

According to the indictment, Suburban Wholesalers Association, Inc. (consisting of twelve wholesale distributors of newspapers and magazines who operate in specified areas in New York, New Jersey, and Connecticut) acts as bargaining agent for its members in negotiating labor contracts with the Newspaper and Mail Deliverers' Union of New York and vicinity. The Union, it is alleged, supplies these distributors with all employees engaged in the handling and delivery of newspapers and magazines, and by provisions in labor contracts between the Union and publishers, such publishers can use as wholesalers only such distributors as are themselves under labor contractual relation with the Union.

The indictment alleges that the total gross sales of newspapers and magazines by the members of Suburban Wholesalers amounted to more than $30,000,000 in 1958.

Acting Assistant Attorney General Robert A. Bicks, in charge of the Antitrust Division, pointed out that Count One of the indictment charges the defendants with an "unlawful combination and conspiracy in restraint of . . . interstate trade and commerce in the wholesale distribution and sale of newspapers and magazines" in violation of Section 1 of the Sherman Act. The indictment alleges that the terms of the conspiracy are:

> "a. To restrain the members of Suburban Wholesalers in their wholesale distribution of newspapers and magazines by coercing and compelling said members to pay to the conspirators various sums of money, as a pre-requisite to obtaining labor contracts with the Union to avoid strikes or the continuation of strikes already called by said Union;

b. To prevent the shipment of newspapers and magazines in interstate commerce to members of Suburban Wholesalers not acceding to the demands of the conspirators; and

c. To hinder and exclude or attempt to hinder and exclude actual or potential competitors of defendants Irving Bitz, Charles Gordon and Bi-County."

In effectuation of the alleged conspiracy, the indictment charges that the defendants used Union influence, duress, and threats of strikes or strikes to compel payments of substantial sums of money by members of Suburban Wholesalers to defendant Bitz and other Union official defendants, including the payment of $25,000 to defendants Lospinuso, Walsh, and Waltzer on or about January and February 1955, and the payment of $45,000 to defendants Bitz, Feldman, Lehman, Lawrence, and Waltzer in 1957.

Count Two of the indictment charges all of the defendants except Lospinuso and Walsh with an "unlawful combination and conspiracy to monopolize for defendants Irving Bitz, Charles Gordon and Bi-County . . . interstate trade and commerce in the wholesale distribution and sale of newspapers and magazines in the area comprising Nassau and Suffolk Counties in the State of New York" in violation of Section 2 of the Sherman Act. This count in the indictment alleges the same substantial terms and the same means of effectuation as alleged in Count One of the indictment, but also charges that this offense was effectuated "by acts of violence and intimidation in 1958 to coerce publishers to deal with defendants Irving Bitz, Charles Gordon and Bi-County to exclude competitors from obtaining business from such publishers."

Assistant Attorney General Malcolm R. Wilkey, head of the Criminal Division, pointed out that the remaining four counts in the indictment charge violations of the Hobbs Act. Count Three of the indictment charges that on or about January and February 1955 defendants Lospinuso, Walsh and Waltzer "did knowingly, wilfully and feloniously obstruct, delay and affect commerce, . . . and the movement of newspapers and magazines in such commerce, by extortion . . . of $25,000 . . . from the officers and agents of Suburban Wholesalers, acting as agents and representatives for all the members of Suburban Wholesalers, with their consent, induced by the wrongful use of fear, in that the defendants . . . did threaten

the members of Suburban Wholesalers with labor disputes, work stoppages, and other labor troubles . . . unless and until the members of Suburban Wholesalers paid . . . the said amount of money." Count Four of the indictment charges the same defendants with a combination and conspiracy to extort this payment of $25,000 from the members of Suburban Wholesalers.

Mr. Wilkey also pointed out that Count Five of the indictment charges that in or about January and February 1957, defendants Bitz, Feldman, Lehman, Lawrence, Waltzer, and Spozate "did knowingly, wilfully, and feloniously obstruct, delay, and affect commerce, . . . and the movement of newspapers and magazines in such commerce, by extortion . . . of $45,000 . . . from officers and agents of Suburban Wholesalers, acting as agents and representatives for all the members of Suburban Wholesalers, with their consent, induced by the wrongful use of fear, in that the defendants . . . did threaten the members of Suburban Wholesalers with labor disputes, work stoppages, and other labor troubles . . . unless or until the members of Suburban Wholesalers paid . . . the said amount of money." Count Six of the indictment charges the same defendants with a combination and conspiracy to extort this payment of $45,000 from the members of Suburban Wholesalers.

U. S. v. *Philadelphia Association of Linen Suppliers, et al.* (U. S. D. C. E. D. Pa., Indict., June 12, 1959).

Attorney General William P. Rogers announced that a federal grand jury in Philadelphia indicted a trade association of linen suppliers, 10 corporations and 9 individuals for violations of the Sherman Antitrust Act. The defendants named in the indictment are the Philadelphia Association of Linen Suppliers and others.

Acting Assistant Attorney General Robert A. Bicks, in charge of the Antitrust Division, pointed out that the indictment was in three counts, the first charging a combination and conspiracy to suppress and eliminate competition in violation of Section 1 of the Sherman Act, the second charging a combination and conspiracy to monopolize interstate commerce in linen supplies in violation of Section 2 of that Act, and the third count charging an attempt to monopolize, also in violation of Section 2.

The indictment charges that since the year 1950, the defendants have engaged in a conspiracy to suppress competition in furnishing

linen supplies to customers in Pennsylvania, southern New Jersey, and Delaware. The terms of the alleged conspiracy included refraining from competing for customers, fixing prices for furnishing linen supplies, submitting rigged bids for furnishing linen supplies to public agencies, institutions and hospitals, and impeding other linen suppliers who were not members of the conspiracy in order to exclude such other linen suppliers from the industry or compel them to join the conspiracy.

The indictment also charges that the combination and conspiracy had various effects in the Philadelphia area. These effects are alleged to be that the flow of linen supplies in interstate commerce has been unreasonably burdened; competition in the business of furnishing linen supplies to customers has been suppressed and eliminated; the freedom of customers to do business with linen suppliers of their own choice has been destroyed; the freedom of linen suppliers to serve customers has been curtailed; and linen suppliers, not named as defendants or co-conspirators, have been excluded from or harassed in the business of furnishing linen supplies to customers.

U. S. v. *The Chandler and Price Co., et al.* (U. S. D. C. S. D. N. Y., Indict., June 19, 1959).

Attorney General William P. Rogers announced that a federal grand jury in New York City indicted six corporations in the printing machinery, equipment and supplies industry. The indictments charged the defendants with illegally fixing prices in violation of the Sherman Antitrust Act.

Western Newspaper Union was named in two of the five indictments, being charged with combining and conspiring with J. M. Huber Corporation to maintain and stabilize prices at which printing ink was sold to ultimate users, and also being charged with combining and conspiring with American Smelting and Refining Company to maintain and stabilize the prices at which typemetal was sold to users. Each of the other defendants was named in only one of the indictments.

U. S. v. *International Brotherhood of Teamsters, Local #142, et al.* (U. S. D. C. N. D. Ind., Complaint, June 30, 1959).

Attorney General William P. Rogers announced that a civil antitrust complaint was filed at Hammond, Indiana against a teamsters'

union local, a trade association and four individuals for conspiracy to restrain interstate commerce in gasoline in violation of Section 1 of the Sherman Antitrust Act.

Acting Assistant Attorney General Robert A. Bicks, in charge of the Antitrust Division, pointed out that the complaint alleges that beginning about 1954, and up to the present time, the defendants, together with other gasoline station operators, engaged in a combination and conspiracy to stabilize retail gasoline prices in Lake County, Indiana and Calumet City, Illinois, in violation of the Sherman Act.

The conspiracy, according to the complaint consisted of an agreement under which: (1) major brand and independent brand gasoline station operators would refrain from advertising, requiring, or permitting the giving of premiums in connection with retail gasoline sales; and (2) major brand gasoline station operators would refrain from advertising the price for the retail sale of gasoline, other than as such price is included as a part of the price computing mechanism constituting a part of any pump or dispensing device.

In enforcing the alleged conspiracy, the complaint alleges that the defendants picketed and threatened to picket, and cut off and threatened to cut off the delivery of gasoline to, those gasoline station operators who did not comply with the terms of the agreement.

An indictment was recently returned by a federal grand jury at Hammond, Indiana against these same defendants charging the same violations of the Sherman Act. The civil complaint now seeks injunctive relief against the practices.

U. S. v. *New York Produce Exchange, et al.* (U. S. D. C. S. D. N. Y., Complaint, June 30, 1959).

Attorney General William P. Rogers announced the filing in the United States District Court for the Southern District of New York of a civil antitrust suit charging restraints of trade in the petroleum testing and inspection business* in violation of the Sherman Act. Simultaneously a final judgment was entered upon consent of the parties terminating the proceedings.

According to the Government's complaint the New York Produce Exchange issues licenses qualifying persons as petroleum inspectors and accounts for all issued petroleum inspectors' licenses in the United States although a substantial volume of petroleum inspection is performed by unlicensed inspectors.

The complaint alleges that the individual defendants were members of the Petroleum Committee of the New York Produce Exchange and are also engaged in the business of petroleum inspection in the United States and foreign companies; that since April 1945 the defendant Exchange and the individual defendants, by agreement, adopted a policy of refusing petroleum inspectors' licenses to persons other than those associated with the individual defendants and their respective companies with the result that qualified individuals were excluded from entering the business of petroleum inspection.

The Final Judgment requires that the Exchange adopt and publish uniform, reasonable and non-discriminatory standards for the granting of petroleum inspectors' licenses, and requires the Exchange to issue licenses to any applicant qualified thereunder. The Final Judgment requires that the standards to be adopted affirmatively provide that membership in the Exchange shall not be a condition to the granting of a petroleum inspector's license and that no individual defendant or other person holding a license issued by the Exchange may vote upon any matter relating to the issuance, rejection, suspension or revocation of any such license. The Final Judgment further requires that the licenses to be issued shall be unrestricted geographically and that the only functional limitation shall be such as is related to the applicant's qualifications.

U. S. v. *The Wichita Eagle Publishing Company, Inc., and The Wichita Eagle, Inc.* (June 29, 1959).

Attorney General William P. Rogers announced the filing in Federal District Court, in Wichita, Kansas, of an antitrust suit against The Wichita Eagle Publishing Company, Inc., and The Wichita Eagle, Inc. The Government's complaint charged that the defendants had violated the Sherman Act by attempting to monopolize the daily newspaper business in Metropolitan Wichita and, in addition, had violated the Clayton Act with their advertising and subscription contracts. After the complaint was filed Judge Delmas C. Hill entered a consent judgment successfully terminating the issues presented by the Government's complaint.

The defendants publish *The Wichita Eagle,* a daily morning newspaper, *The Wichita Sunday Eagle,* a Sunday newspaper and *The Evening Eagle,* a daily evening newspaper. In Metropolitan Wichita there is only one competing newspaper, the evening and

Sunday paper published by The Wichita Beacon. The Government's complaint charged that the defendants among other things had required classified and general advertisers to contract to purchase advertisements in the evening Eagle and the morning paper at a forced combination rate. It was further charged that the defendants required subscribers in Metropolitan Wichita to take the evening paper if they desired the morning paper and the papers were sold only as a unit (13 newspapers weekly).

The judgment entered by the Court prohibits the defendants from refusing to sell advertising separately in the morning, evening or Sunday newspapers. If the advertiser desires to place advertisements in both the morning and evening newspapers, defendants are permitted to grant a combination discount of no more than 20% with respect to display advertising, and 25% with respect to classified advertising. The judgment requires the defendants to permit home subscribers to take the papers on a basis which permits taking the morning paper only, the evening paper only or the Sunday paper only. For the next two years the defendants may not grant any discount in their regular subscription rates if the home subscriber desires to take, for example, a combination of the morning and evening papers. After the two years any combination subscription rate which the defendants desire to introduce must first be approved by the Court. The judgment enjoins various other practices, such as coercing advertisers to purchase more advertising than they desire, refusing to sell advertising in the morning newspaper until the advertiser refrains from using other advertising media and other similar activities.

U. S. v. *Hamilton-Cosco, Inc.* (U. S. D. C. S. D. N. Y., Consent judgment, June 29, 1959).

Attorney General William P. Rogers announced the filing in the Federal Court in New York City of a civil antitrust suit against Hamilton-Cosco, Inc., Columbus, Indiana, a leading manufacturer of metal and plastic furniture and of related products. As soon as the Government's complaint was filed a consent judgment, the result of pre-filing negotiations, was entered successfully terminating the action.

The Government's suit alleges that Hamilton entered into a conspiracy with its wholesalers to fix minimum prices to be charged

for furniture sold under the trademark "Cosco," both by wholesalers and by retailers. It was further charged that Hamilton and the wholesalers refused to sell such Cosco products to any wholesalers or retailers who did not agree to adhere to the minimum retail prices.

The judgment entered requires defendant Hamilton to cancel all of its so-called "fair trade" agreements with wholesalers and prohibits, for a period of five years, Hamilton's entering into any such new agreements. The judgment also prohibits Hamilton from boycotting or otherwise refusing to deal with any wholesaler who has been regularly designated by the defendant to act as its wholesaler. This will prevent Hamilton from cutting off a wholesaler who sells Cosco products at prices lower than Hamilton believes should be charged or wholesalers who sell to discount houses.

U. S. v. *A. S. C. A. P.* (U. S. D. C. S. D. N. Y., Proposed order, June 29, 1959).

Attorney General William P. Rogers announced the filing in the Federal District Court in New York City of a proposed Order directing the American Society of Composers, Authors and Publishers (ASCAP) to carry out in certain specific, detailed ways the terms of an antitrust judgment entered against the Society in 1950. ASCAP is composed of approximately 1,200 publishing concerns and 4,000 authors and composers. The terms in question related basically to the rules and regulations of ASCAP governing the distribution to its members of over $28,000,000 annually which the Society receives from licensing the commercial use of the copyrighted music composed or published by its members. These licenses are to the radio and television industry and the more than 25,000 other users such as hotels, bars, skating rinks and restaurants.

At the time the proposed order was submitted to the Court it was pointed out that ASCAP after pre-filing negotiations had agreed to the terms of the order. The Court entered an order requiring the parties on October 15, 1959 to show cause why the proposed Order should be entered and directed ASCAP to mail a copy of the proposed Order to each member and the members may then make application to be heard pursuant to the terms of the show cause order.

The practices which the proposed order seeks to remedy, relate to six fundamental factors. These factors relate to the conduct of

ASCAP in its dealings with its members or concern the manner in which it divided the amounts of its revenues due its publisher and writer members.

Thus:

(1) The proposed order requires that ASCAP pay resigning members on the same basis as others when the Society continues to license their works. Resigning members are thus permitted to continue licensing existing copyrights through ASCAP when a co-writer or publisher is also licensing the same work through ASCAP. But the resigning member is free to license new works through another organization.

(2) ASCAP would be ordered to conduct a scientific census or sample of performance of its members' compositions. The results of the survey must be weighted in proportion to what the Society receives from the licensees where the surveyed performances occurred. A provision is included to permit re-examination by the Court of the survey after 18 months of operation. A court appointed expert will report to the Court and the Government on the design and operation of the survey and will prepare estimates of the accuracy of the samples of performances.

(3) Each ASCAP writer would be given an option to receive payment based on the results of the survey or in the alternative to receive payment based on such factors as a five year average of performances of "recognized works" and on the length of time the writer has been a member of ASCAP. (A "recognized work" is defined as one which has received performance credit in the ASCAP survey at least one year prior to the performance in question.) The proposed order seeks to assure the maximum feasible area of individual choice. An exception from these options is made for the top one hundred writers in ASCAP. These writers may vote to deny themselves the option to receive payment on a per performance basis.

Each publisher member would be given an option to receive payment on the basis of the results of the survey. In the alternative, a publisher may take into account the length of his ASCAP membership and the number of performances of his "recognized works."

The order contains detailed provisions governing payment for theme songs, background music on dramatic programs, advertising

jingles, copyrighted arrangements of works in the public domain, and serious compositions of more than three minutes duration.

(4) ASCAP would be directed to weight the votes of its members, if at all, only on the basis of the performance credits which they received in the survey. No member may have more than 100 votes. This is in sharp contrast with the existing practice where the publisher members having the most votes in 1957 had 1,469 votes and the writer member having the most votes in that year had 5,116 votes. A progressively higher number of performance credits is required for each vote above twenty. Provision is made to permit a minority of one-twelfth to elect a director. The ten largest groups of affiliated publishing firms are limited to a maximum of slightly less than forty-one percent of the total publisher vote.

(5) ASCAP would be ordered to keep certain records and make them available to any member upon various conditions. ASCAP must make the addresses of its members available to other members and it must inform the membership of all changes in its rules affecting distributions to the members. Provisions are included designed to speed up direct appeals to the impartial panel of arbiters. Other procedural safeguards are included to protect the rights of members in these appeals.

(6) ASCAP would be required to admit all qualified applicants for membership and to publicize the qualifications for membership twice a year in certain trade papers.

U. S. v. *Frozen Food Distributors Ass'n of Greater New York, et al.* (U. S. D. C. S. D. N. Y., Consent judgment, May 15, 1959).

Attorney General William P. Rogers announced the entry, in the Federal District Court in New York City, of a consent judgment successfully terminating a civil antitrust suit, filed on June 30, 1958, charging a trade association, six corporations and five individuals with violating Section 1 of the Sherman Act in connection with the sale and distribution of frozen food specialties. Frozen food specialties are prepared and pre-cooked before freezing, such as cakes, fish sticks, pizzas and complete dinners. The corporation defendants are distributors of frozen food specialties in the New York metropolitan area, and each of the individual defendants is or was an officer of the defendant association and of one of the defendant corporations.

The complaint charged that the defendants engaged in a conspiracy among themselves and other co-conspirators to increase prices of frozen food specialties to arbitrarily high levels, to boycott packers who sell to non-conforming distributors, and to have distributors boycotted who sold at lower prices than those agreed upon by the defendants.

The judgment entered enjoins all defendants other than the trade association from agreeing to fix their prices or those of other distributors, to boycott any packer, or to bring about a boycott of distributors by any packer or of packers by any distributor. Additional injunctions, in similar respects, are directed against individual action of any such defendant. The judgment requires the defendants to dissolve the defendant trade association at the earliest possible date. The distributor defendants are further prohibited from joining, or cooperating in any way with, any trade association or other organization engaged in activities contrary to the judgment injunctions.

U. S. v. *Metropolitan Detroit Ford Dealers, Inc., et al.* (U. S. D. C. E. D. Mich., Indict., May 15, 1959).

Attorney General William P. Rogers announced that a Federal Grand Jury in Detroit, Michigan returned an indictment charging the Metropolitan Detroit Ford Dealers, Inc., and twenty-two Ford Dealers in the Metropolitan Detroit area with Sherman antitrust violations in connection with the sale and distribution of new automobiles.

The indictment in Count One charges defendant dealers with having engaged for the past several years in a combination and conspiracy to raise, fix and stabilize the retail prices of automobiles sold in the Metropolitan Detroit area by agreeing to adopt and utilize uniform list prices substantially higher than the list prices suggested by the manufacturer and by agreeing to adopt uniform prices in the resale of parts and accessories.

Under Count Two of the indictment, defendant dealers are also charged with having engaged in a combination and conspiracy to fix and establish a minimum gross profit to be made on new automobiles sold in the Metropolitan Detroit area by agreeing to refrain from making retail sales of new automobiles at prices which would

result in the dealer realizing a gross profit of less than two hundred twenty-five dollars.

The effects of these agreements, according to the indictment, are: (a) price competition among Ford Dealers in the Metropolitan Detroit area has been artificially suppressed and restricted, (b) retail list prices used by defendant dealers in selling Ford automobiles in the Metropolitan Detroit area have been arbitrarily fixed and maintained at high, uniform and non-competitive levels and (c) purchasers of Ford automobiles from Ford Dealers in the Metropolitan Detroit area have been deprived of an opportunity to purchase in a free and unrestricted market.

U. S. v. *The Hertz Corporation* (U. S. D. C. S. D. N. Y., Complaint, May 1, 1959).

Attorney General William P. Rogers announced the filing in the United States District Court for the Southern District of New York of a civil antitrust complaint alleging that a series of acquisitions of motor vehicle renting and leasing companies by The Hertz Corporation violates Section 7 of the Clayton Act.

Hertz, the largest motor vehicle renting and leasing company in the United States, during the past five years has acquired the stock or assets (including, among other things, over 20,000 vehicles, airport and railway terminal concessions, garages and other facilities) of numerous companies engaged in one or more phases of the motor vehicle renting and leasing industry in various geographical areas of the United States at a cost of about $40,000,000.

Section 7 of the Clayton Act makes unlawful acquisitions and mergers, the effects of which may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country. This suit charges that the cumulative effect of the acquisitions made by Hertz has been to eliminate competition between Hertz and the acquired companies in automobile renting and leasing throughout the United States; and automobile and truck renting and leasing in the New England States, in the New York City area, and in Florida. The suit, also, charges that as a result of the acquisitions Hertz's competitive advantage over other motor vehicle renting and leasing companies has been enhanced to the detriment of actual and potential competition and that concentration in the vehicle renting and leasing industry and in certain

phases thereof may be further increased nationwide and in certain sections of the country.

This suit seeks, among other things, to force Hertz to divest itself of the unlawfully acquired companies and to prevent it from acquiring additional companies so that competition can flourish in this relatively new and fast growing industry.

Federal Trade Commission Activity

F. T. C. v. *Socony Mobil Oil Co., Inc.* (FTC Dkt. #6915, Init. dec., July 31, 1959).

The equipment and property improvement deals that Socony Mobil Oil Co., Inc., New York City, gives its automobile dealer customers are not unfair methods of competition, a Federal Trade Commission hearing examiner ruled.

Ordering dismissal of an FTC complaint, issued Oct. 14, 1957, Examiner Robert L. Piper held that Socony's benefits do not (1) substantially lessen competition or create a monopoly, or (2) induce car dealers to handle its oil and grease exclusively or to stop handling competitive products. Socony is one of the world's largest integrated petroleum producers.

Almost all competitors, except a few who prefer not to do so, offer similar deals, and Socony offers them only when necessary to meet competition and has lost more business than it has won through competitive offers, the examiner found.

Prior to World War II, he said, car dealers were furnished with relatively inexpensive dispensing equipment. After the war, competition for this market became intense due to the large increase in new car sales. Suppliers began offering lower prices and quantity discounts, furnishing expensive lubrication equipment and improvements (such as blacktopping, painting and structural changes), and furnishing guarantees to automobile purchasers using their products.

The industry practice is to furnish equipment and improvements under contracts calling for minimum purchases over a stated period, with the cost amortized by crediting a specified discount per gallon of lubricant purchased.

Socony's contracts, Examiner Piper held, "were not requirements contracts or exclusive dealing contracts, and the purchaser was free to purchase lubricants from other sources although agreeing to buy

a minimum amount from respondent. In actual practice the equipment deals had no effect upon the purchaser's freedom to enter into contracts with other sellers for future purchases of lubricants. Because of the competitive conditions, substantially all of the sellers would take over equipment furnished by a competitor to a dealer, purchase such equipment or pay the unamortized portion thereof to the competitor, and provide for the amortization of same by the dealer in return for a contract agreeing to purchase oil from it. In other words, although unamortized amounts might still be owed on such equipment, in practice this in no way hindered the dealer from changing suppliers and negotiating new contracts with competitors."

At least 3 of the 6 competitors of Socony who testified showed very substantial increases in total sales from 1946 to the time of the complaint, the examiner emphasized. What little reliable evidence there is respecting the other 3 indicates that their sales steadily increased until 1956 and the decline, if any, since then cannot be attributed to Socony's practices.

"The fact that these same competitors were able to capture more accounts from Socony than it was able to capture from them is substantial evidence that Socony's competitive practices in no way contributed to any decline in their sales figures. In addition thereto, the record establishes that the peak year for new car sales was 1955. Since then sales of cars have declined substantially, as well as the number of car dealers in business, both of which facts necessarily would cause a decline in the overall sale of lubricants to car dealers," he stated.

The examiner rejected the various arguments advanced by counsel supporting the complaint to support the contention that the furnishing of equipment or improvements by Socony is an unfair method of competition.

For example, counsel argued in effect that the company can offer better deals than smaller competitors because of its greater financial resources.

To this, the examiner said: "If respondent engaged in such methods of competition with a predatory purpose or power to acquire unlawful monopoly, such practices, even though legal in and of themselves, might be considered an unfair method of competition

as part of such a predatory scheme or objective tending toward monopoly. However, the record here demonstrates not only that the competitors are able to meet, and indeed beat, such competition, but that respondent only makes such competitive offers when compelled to do so in order to meet competition. This factor negates any inference of predatory intent or attempt to monopolize. The record establishes that if respondent did not meet such competition of the various types hereinabove considered, it would soon find itself completely out of the car dealer market."

Even assuming, *arguendo,* he continued, that Socony's offers were better than its competitors, in the final analysis FTC counsel apparently contends that competing successfully is an unfair method of competition.

"Certain types of competition which capture larger shares of the market, and in that sense lessen competition, such as price discrimination, exclusive dealing arrangements, and unfair and deceptive practices, have been legally declared unfair methods of competition. The methods used are unfair—and demonstration of probable effect is necessary—but the effect is not what creates the unfairness. If successful competition, which lessens competition by capturing a greater share of sales by means of lower prices, etc., is outlawed as an unfair method of competition, all real competition will cease and the very objectives sought by the antitrust laws, better products at lower prices achieved by the forces of real competition in the market place, will be negated," the examiner commented.

F. T. C. v. *The Procter and Gamble Distributing Co.* (FTC Dkt. #7542, Complaint, July 31, 1959).

The Federal Trade Commission announced a complaint against The Procter & Gamble Co. and its wholly-owned subsidiary, The Procter & Gamble Distributing Co., Cincinnati, Ohio, charging that their exclusive contracts under which they provide manufacturers of automatic washing and dish-washing machines with free samples of P. & G.'s detergents (Tide, Dash and Cascade) illegally restrain trade.

They also are charged with claiming falsely that the manufacturers endorse the three detergents as better than all other competitive products and recommend their exclusive use.

According to the FTC's complaint, in the nation's grocery stores in 1957 Tide was the largest selling heavy-duty high sudser detergent (used primarily in top-loading or agitator type automatic washing machines), accounting for 41.2% of sales; and Dash was the second largest selling heavy-duty low sudser detergent (developed principally for use in tumbler type or front-loading machines because high-sudsers sometimes are unsuitable), enjoying 33.2% of sales.

Under a program begun in 1954, the complaint says, the two P & G companies had by August 1957, signed exclusive free sampling contracts for Tide or Dash with every domestic manufacturer of automatic top-loading and front-loading machines and automatic combination washer-dryer machines. Thus they gained a monopoly in this promotional method, the complaint declares.

Under these contracts, the complaint continues, the manufacturers are furnished free packages of Tide or Dash, as the case may be, to be placed in each machine when factory crated. They agree to place no other competitive products in their machines, to allow use of their names in promotional advertising to be paid for by P & G, to encourage their distributors, wholesalers and dealers to use Tide or Dash in demonstrations, to endorse use in the washers, and to cooperate with P & G in jointly promoting their washers and the particular detergent involved.

In return, the complaint states, the P & G companies agree to feature the washers in advertising and to prepare and pay for the advertisements. The cost to them is several million dollars each year and the advertising value to a leading manufacturer runs as much as two-thirds to a million dollars a year.

They also have entered into contracts with the manufacturers' distributors, demonstrators and dealers, the complaint continues.

These demonstrating organizations allegedly receive (1) free replacement for packages of Tide or Dash removed from an automatic washer before it is received by them, (2) special reduced prices on the products for use as a premium or give-away with the purchase of a washer, and (3) payments for using the two detergents in demonstrations and exclusively recommending them.

A further allegation is that the respondents have entered into generally identical contracts for Cascade with manufacturers of automatic dishwashers. Originally, these contracts did not have the

exclusive free sampling requirement, but recent contracts contain it, the complaint notes.

It charges that P & G's exclusive free sampling contracts have unduly hindered competing detergent manufacturers from engaging in free sampling and from receiving the prestige of these endorsements.

The respondents also have violated the law by falsely advertising the detergents, the complaint alleges, citing dozens of challenged claims including these:

> "There's a good reason why Westinghouse recommends Dash for the automatic washers. For in this automatic, Dash gets clothes cleaner than any product in the world."

> "Yes, General Electric puts Tide in their new automatics . . . just as so *many* other manufacturers do! And they are so right! Because in every one of their top-loading automatic washers, no leading washday product made, *nothing* else, with or without suds, can beat Tide for getting clothes clean . . ."

> "Only Procter & Gamble's new Cascade gets everything 'close-up clean.' That's why American Kitchens puts Cascade in every new dishwasher."

Contrary to the advertisements, the complaint charges, the manufacturers do not recommend and insert the free samples in their machines because Tide, Dash and Cascade are better than all other competitive products in their respective markets, but simply to receive the free advertising. The complaint alleges that they neither believe the three detergents are better than such competitive products nor so recommended them; and they do not desire them to be used in their machines to the exclusion of other products. The manufacturers did not voluntarily decide to place the free samples nor do so independent of P & G, but inserted them only because of the contracts.

The fact is, continues the complaint, they desire and recommend only that the right type of product be used in their machines, and their instruction books either recommend none at all or several. In the latter case, usually 4 or 6 products are named, including Tide, Dash or Cascade, depending on the type of machine.

The complaint further challenges the respondents' failure to reveal in advertising that they solicit and pay for the exclusive free sampling and that the advertising endorsements are their own, and not the

manufacturers. This deception enhances the value of the exclusive contracts by unfairly misrepresenting the status of the relationship between the manufacturers and the P & G companies, the complaint concludes.

F. T. C. v. *Stewart & Stevenson Services, Inc., et al.* (FTC Dkt. #7002, Consent order, June 8, 1959).

The Federal Trade Commission has affirmed a consent order requiring the franchised wholesale distributors of General Motors diesel engines and replacement parts to stop conspiring to fix or maintain prices for the parts.

The order was agreed to by five concerns and the FTC's Bureau of Litigation. It was contained in Hearing Examiner Frank Hier's initial decision, which the Commission adopted.

In its complaint of Dec. 19, 1957, the FTC alleged that these wholesalers, together with others, used their power as the only franchised distributors in their area to agree upon prices, discounts, terms and conditions of sale. A further charge was that they acted together to maintain and carry out the terms and conditions agreed upon.

The replacement parts include liner kits, pistons, ring sets, main bearing shell sets and injectors. The parts and engines are supplied by Detroit Diesel Engine Division of General Motors Corp.

The agreements by the five distributors to discontinue these restrictive practices are for settlement purposes only and do not constitute admissions that they have violated the law.

F. T. C. v. *Airtex Products, Inc.* (FTC Dkt. #6816, Consent order, May 25, 1959).

The Federal Trade Commission has approved a consent order requiring Airtex Products, Inc., Fairfield, Ill., to stop charging competing customers different prices for its automotive replacement parts.

The Commission adopted an order by Hearing Examiner William L. Pack which had been agreed to by both Airtex and the FTC's Bureau of Litigation.

In its June 11, 1957 complaint, the FTC alleged the company violated Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act by allowing wholesalers who belong to buying groups an 18% discount on all purchases, while granting competing independent wholesalers 18% only on annual purchases exceeding $1,500.

A further charge was that the company's discount schedule (8% rebate on purchases up to $1,500, and 18% over that figure) resulted in small independent wholesalers paying higher prices than heavier-buying independent competitors. However, the Commission ruled that cost studies submitted by Airtex showed that existing price differentials between the independents made only due allowance for differences in selling and delivering costs. It also ordered this cost material placed *in camera*.

F. T. C. v. *New Orleans Shrimp Co., Inc.* (FTC Dkt. #7274, Consent order, May 25, 1959).

Approval of a consent order requiring New Orleans Shrimp Co., Inc., New Orleans, La., to stop paying illegal brokerage to its customers was announced by the Federal Trade Commission.

This action represents the adoption by the FTC of an initial decision by Hearing Examiner William L. Pack based on an order agreed to both by the company and the Commission's Bureau of Litigation.

The FTC's complaint, issued last Oct. 8, charged that 60% of the company's sales are not handled through brokers, but these direct purchasers are given allowances approximating the normal brokerage fee or price reductions reflecting this brokerage. These arrangements are forbidden by Sec. 2(c) of the Robinson-Patman Amendment to the Clayton Act, the complaint alleged.

F. T. C. v. *Globe Readers Service, Inc.* (FTC Dkt. #7490, Complaint, May 25, 1959).

Deception in the door-to-door sale of magazine subscriptions is charged in a Federal Trade Commission complaint against Globe Readers Service, Inc., Michigan City, Ind.

Globe furnishes its dealers' door-to-door solicitors with credentials, order and receipt forms, lists of magazines it is authorized to sell, and other materials, the FTC's complaint states.

Frequently, the complaint alleges, these canvassers sell subscriptions for magazines which are unlisted and undeliverable. Globe refuses to make refunds and, to get some benefit for their money, customers must accept a substitute magazine from the authorized list which they would not have otherwise ordered or accepted.

These unfair methods of competition violate the FTC Act, the complaint concludes.

F. T. C. v. *Pangburn, Inc.* (FTC Dkt. #7447, Consent order, Aug. 3, 1959).

The Federal Trade Commission announced its approval of a consent order prohibiting Pangburn, Inc., Fort Worth, Tex., a manufacturer of chocolates sold almost exclusively in drug stores, from charging different prices to competing customers.

The Commission adopted an order by Hearing Examiner John B. Poindexter, which had been agreed to both by the company and the FTC's Bureau of Litigation.

Alleging violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act, the FTC's March 17 complaint charged that the concern gives drug chain customers preferential prices under its annual cumulative quantity discount system—ranging from 1% on yearly purchases of from $1,000 to $1,999, to 10% on $10,000 and up.

Pangburn, the complaint said, allows the chains to combine purchases of their various outlets, even in more than one city or state, in order to qualify for the 10% discount. Frequently, according to the complaint, the purchases of the individual stores of the chains receiving the maximum rebate are too small to warrant any discount at all.

In many cases, the complaint continued, independent or non-chain customers buy in much greater volume than a competing individual chain outlet (often, but a few blocks away), but receive either no discount at all, or at best not more than 1, 2, 3 or 4%.

The order provides that Pangburn must charge the same net prices to customers who compete with each other in reselling its products. However, the company may defend itself in an enforcement proceeding by showing that its differentials make only due allowance for differences in manufacturing, selling or delivery costs.

F. T. C. v. *The Firestone Tire & Rubber Co.* (FTC Dkt. #7141, Order, May 22, 1959).

The Federal Trade Commission ordered The Firestone Tire & Rubber Co., Akron, Ohio, to stop giving illegal price concessions to a favored few of its 12,000 to 14,000 direct franchised dealers.

The Commission adopted Hearing Examiner Joseph Callaway's March 26 initial decision based on a stipulation between counsel in lieu of evidence. The examiner held Firestone has classified less

than 50 of such dealers as "warehouse dealers" and granted them price benefits not accorded their competitors.

The FTC agreed that these price discriminations may result in a substantial lessening of competition between the favored and unfavored dealers in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act.

Under the warehouse agreement, Firestone ships tires and tubes without charge to the warehouse dealers, who distribute them to other direct franchise dealers for a 5% commission. The contract expressly forbids any commission on merchandise which the warehousemen withdraw from stock and resell for their own account in competition with the other dealers.

Despite this provision, the examiner found, some of the warehousemen were paid the 5% on all tires and tubes purchased, including those bought for resale or internal distribution.

In addition, he said, all warehousemen not only receive lower prices through preferential discounts and freight payments, but are not charged for consigned stocks (including tires and tubes redistributed internally), although their competitors are subject to a 5% service charge on consignments.

The order provides that henceforth Firestone must charge the same net price to purchasers who compete with each other in reselling or distributing its products.

The Commission upheld Examiner Callaway's dismissal of the charge that Firestone pays some of the favored customers a 5% warehouse commission on purchases of Home and Auto Supplies, but withholds it from other direct franchised dealers.

This was paid only to one customer but was terminated over a year before the complaint issued on May 7, 1958, and there is reason to believe it will not be resumed, the examiner pointed out. There is no evidence presently available that this commission endangered competition, he added.

F. T. C. v. *Heckethorn Mfg. & Supply Co.* (FTC Dkt. #7499, Complaint, June 1, 1959).

The Federal Trade Commission issued price discrimination charges against Heckethorn Manufacturing & Supply Co., Dyersburg, Tenn., a manufacturer of automotive shock absorbers, seat cushions, and other products.

Heckethorn allegedly has charged favored purchasers less than their competitors who bought at or near the same time. These price discriminations, the FTC's complaint declares, may substantially lessen competition or tend to create a monopoly in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act.

F. T. C. v. *Thompson-Hayward Chemical Co.* (FTC Dkt. #7527, Complaint, July 10, 1959).

The Federal Trade Commission announced charges that Thompson-Hayward Chemical Co., Kansas City, Mo., has illegally lessened competition by selling its liquid laundry bleach at much lower prices in one market area than in another.

Thompson-Hayward, a manufacturer and distributor of industrial and agricultural chemicals, has two bleach plants, one in Kansas and the other in Dallas, Texas, the FTC's complaint says. Soon after the latter plant opened in 1954, the company began selling bleach in the Dallas-Fort Worth area for 25¢ a gallon in 5-gallon crates, later cutting the price to 20¢. Meanwhile, it maintained its price in the Kansas City area at 40¢, 50¢ or 75¢ a gallon, depending on the quantity purchased.

The complaint charges that these different prices have caused competing sellers of bleach in the Dallas-Fort Worth area to suffer a serious loss of business, in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act. Sec. 2(a) forbids price discriminations where the effect may be substantially to injure competition or tend to create a monopoly.

Thompson-Hayward operates about 18 branches in 12 states and its total annual sales are approximately $24 million, the complaint notes.

F. T. C. v. *Fieldcrest Mills, Inc.* (FTC Dkt. #7528, Complaint, July 10, 1959).

The Federal Trade Commission brought charges that Fieldcrest Mills, Inc., Spray, N. C., a large manufacturer of rugs, carpets, and "domestics" (blankets, bedspreads, sheets, pillow cases, etc.), has discriminated among its customers in paying promotional allowances and furnishing services.

Fieldcrest has granted some customers advertising payments and various facilities which it has not made available to all competing

customers on proportionally equal terms, as required by Secs. 2(d) and (e) of the Robinson-Patman Amendment to the Clayton Act, the FTC's 2-count complaint alleges.

For example, the complaint says, Fieldcrest pays promotional allowances to favored customers on more generous contract terms than their competitors, or favors them by not making their payments in accordance with the contracts. Also, the company determines some customers' allowances by individual negotiations and pays varying amounts, up to 100% in some instances.

Fieldcrest furnishes only favored customers with a "Fieldcrest Shop" and also provides for training their sales personnel, the complaint continues.

According to the complaint, Fieldcrest sells nationally to retailers, distributors, jobbers, mail order and premium houses, and chain stores. "Domestics" products are sold through its Fieldcrest Division, and rugs and carpets through its Karastan Division. The concern's 1958 sales exceeded $62 million.

BOOK REVIEWS

Philip D. Bradley (ed.), *The Public Stake in Union Power* (Charlottesville: University of Virginia Press, 1959), pp. 382, $7.00.

The so-called wage-push inflation of 1955-57 has made union power once again[1] a timely subject for academic inquiry. The present book developed from a guest lectureship seminar held at the University of Virginia during the spring term of 1958. Each lecturer was given considerable freedom in choosing his topic, so the book resembles a collection of independent articles rather than an integrated symposium.

The sixteen contributors are general theorists, which means that a more critical evaluation of unionism emerges than if the analysis were made by labor economists. The editor has divided the book into two parts. Part I contains 8 articles that can be easily read by the general reader. In Part II, there are 5 articles that require

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1 See, for example, *Labor Unions and Public Policy* (Washington: American Enterprise Association, 1958), pp. 177; and David McCord Wright (ed.), *The Impact of the Union* (New York: Harcourt Brace and Co., 1951), pp. 405.

knowledge of the techniques of economic analysis and 3 articles that do not deal directly with union power.

In previous writing on the economic impact of unionization, two conflicting views have emerged. One group, led by E. H. Chamberlin of Harvard, is certain that unions have strong monopoly power. In the present book, Chamberlin states:

> "Indeed there seems to be abundant evidence now that a new generation of labor leaders has at last become fully aware of the tremendous economic power which is actually in their hands, and are prepared to exploit it as never before" (p. 6).

With this power, the Chamberlin group argues that unions can (1) raise money wages for the labor force as a whole, and thereby produce inflation and (2) interfere in the product market and restrain trade by means of secondary boycotts, second-party picketing, and the like. A third theme not stressed by this group but one with which they would agree is that unions also raise relative real wages and cause some misallocation of resources between union and non-union industries.

The second group, namely the "Chicago School," has as its principal spokesman, M. Friedman, who argues that unions have potential monopoly power but this power, like that of industrial monopolies, is grossly exaggerated. On the basis of admittedly crude statistical data, Friedman has stated that "perhaps 10 per cent of the labor force has had its wages raised by some 15 per cent."[2] Union monopoly power, says Friedman, is rarely effective in the long run because of the interplay of free market forces. To the extent that there is monopoly power, it will reside with craft unions or craft-like organizations, e.g. the American Medical Association, because these unions are favored generally by lower elasticity of demand for union labor (as opposed to industrial unions) and also because these unions are often the recipients of government protection by means of licensing provisions, franchises, etc.

This basic conflict on the extent of union power carries over to differences in interpreting the causes of the recent inflation. The Chamberlin group takes the position that, since 1951, inflation in

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[2] M. Friedman, "Some Comments on the Significance of Labor Unions for Economic Policy," in D. McCord Wright, *op. cit.*, p. 216.

the non-agricultural sector has been caused by factors operating from the cost side, i.e. a wage-push. The Friedman group takes the more traditional view that the recent inflation was largely from the demand side, i.e. a demand-pull.

The difference in views outlined above lies behind the choice of subject matter in the present volume. In addition to Chamberlin, G. Haberler, W. Fellner and J. R. Meyer concentrate on the wage-push inflation problem. The Chicago school (Friedman was not a contributor) was represented by H. G. Lewis, G. S. Becker, and G. W. Nutter, and they concentrated on the monopoly power of craft unions. A. E. Rees of Chicago, who on other occasions has aligned himself with the Friedman group, discusses non-wage aspects of collective bargaining with emphasis on grievance procedure and seniority.

It was not surprising to find F. A. Hayek in the role of most critical (and most pessimistic) assessor of union power. Hayek's article stresses the syndicalist nature of the profit-sharing proposal by Walter Reuther in the 1958 automobile negotiations. F. H. Knight presents a philosophical and economic interpretation of the role of unions in a free society, and D. McWright's article can be roughly summarized in this statement:

> "The fundamental dilemma is thus not racketeering and dishonesty, but the basic philosophy of much of the modern labor movement itself—a philosophy which tends always and everywhere, albeit often unconsciously, to work against growth, incentives, change, opportunity, continuing political democracy and development" (p. 119).

Returning to wage-push inflation, Fellner presents a simplified model of the inflationary process, with which he analyzes recent price inflation in Sweden, the United Kingdom, and the United States. Within the framework of national income analysis, J. R. Meyer discusses the methods by which wage increases are transmitted to price and income changes through the media of savings and investment schedules. A careful analysis of the purchasing power theory of wages is also presented in this essay. Haberler reviews the wage-push and demand-pull controversy. On the question of public policy, the wage-push economists generally favor restrictive monetary policy as

the first line of defense against inflation, but they feel that the measures needed for price stability would probably result in a politically intolerable level of unemployment. Consistent with this viewpoint are proposals to extend anti-monopoly policy to unions, particularly with the view of preventing industry-wide wage-setting. For the wage-pushers, the culprit appears to be industrial unionism.

For the Chicago group emphasizing the limited monopoly power of craft unions, Lewis, in the most thought-provoking article in the book, provides a theoretical scheme for identifying competitive and monopoly unionism by means other than the usual method of comparing union and nonunion wages. If a union is an effective monopolist, Lewis infers that it will adopt certain non-wage practices that will identify it as such. In a companion piece, Becker evaluates union restrictive practices and supplies interesting but brief case studies of union monopolies. Nutter continues the theoretical presentation of the Chicago school by defining the limits of union power. Although not discussed in this volume,[3] the major policy proposal of the Chicago group is that unions, as well as companies, be subject to the same rules of the monopoly game and that the Clayton Act be amended to allow the prosecution of unions under the Sherman Act.

Two articles of special interest to *Bulletin* readers are: P. D. Bradley's "Freedom of the Individual Under Collecticized Labor Agreements," and J. W. McKie's "Collective Bargaining; Maintenance of Market Competition." The Bradley article concentrates on compulsory unionism, particularly the "union shop" issue. Although emotional in parts, e.g. "through unions, thugs now control vast quantities of purchasing power" (p. 169), Bradley presents a strong case for worker freedom in choosing whether to belong or not to belong to a union. The "free rider" issue which is the key argument for those in favor of union shops is discussed by Bradley in an earlier volume.[4] What I found most interesting was Bradley's charge that the union shop was inappropriately and incorrectly introduced into the steel industry in 1952 by the Wage Stabilization Board, and the

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[3] See Friedman, *op. cit.*

[4] *Labor Unions and Public Policy*, *op. cit.*, pp. 47-91.

further suggestion that government officials, as well as employers, have joined with organized labor in order to deprive individual workers of free choice in this matter of union membership. McKie reviews the major ways in which unions use their monopoly power, both in labor and product markets. He describes the limitations of the present legislation in dealing with these practices, and then proposes the following program for controlling the monopoly power of unions:

(1) "Enforcement of the provisions of the Taft-Hartley Act on closed shops, secondary boycotts, and secondary strikes. The ban should explicitly include secondary picketing. The NLRB should be empowered to act on its own initiative against these restrictive practices.

(2) Elimination of union control of local licensing and inspection.

(3) Reversal of the Hutcheson decision, by legislative amendment of the Clayton and Norris-LaGuardia Acts if necessary, to subject union control of product markets to the sanctions of the Sherman Anti-Trust Act" (pp. 109-110).

Space limitation prevents a discussion of the last 3 essays in the book, although they merit a complete review. The essays are: "Wage Theory in an Age of Organized Labor" by J. M. Clark; "Regulated Wages in Underdeveloped Countries" by P. T. Bauer; and "Private Property and the Relative Cost of Tenure" by A. A. Alchian.

This book has something for everyone, but its heterogeneity is perhaps its major shortcoming. The general reader would have benefited from a summary chapter. Although the book is primarily oriented towards the professional economist, there are a number of excellent articles that would be of interest to the attorney or to others interested in public policy towards labor unions.

The reader will find little evidence in this volume to support the generally critical attitude of the contributors towards unions. We should know the answers to questions on whether (and how much) unions raise money and/or real wages; and whether industrial or craft unions are responsible for whatever wage effects occur. Since this volume is the second major critique of union power by general

economists, it is probably time for the labor economists to produce such evidence as is available so that public policy will be derived from a firmer base.

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Joseph W. Burns, *A Study of the Antitrust Laws,* Central Book Company, Inc., N. Y., 1958, pp. xiv + 574.

The author of this study brings a definite legalistic point of view to his task. He exhibits a complete knowledge of the subject and the belief that something positive can be accomplished by a vigorous enforcement of the antitrust laws. Even though the author's treatment of each subject, necessarily, is synoptic, the style and presentation are characteristically even and clear.

The book presents the published and unpublished staff report of the Subcommittee on Antitrust and Monopoly (Senate Judiciary Committee), which held five series of public hearings between May and December 1955. The hearings were devoted to the adequacy of the antitrust laws, monopoly and oligopoly, mergers, price discrimination, foreign trade, and the antitrust jurisdictions of the F. T. C. and the Department of Justice. The purpose of the investigation was to examine the entire antitrust area in order to determine whether the relevant laws required clarification, unification, amendment, or revision. Although almost one-half of the study is devoted to mergers and acquisitions (with a detailed case study of the G. M. C.), the most interesting and original materials are found in the sections on judicial opinions of the antitrust laws, overlapping enforcement jurisdiction, and opinions on mergers and distribution practices.

One portion of the report is devoted to the uncertainty and inconsistency in the antitrust statutes, as laws, as well as in judicial interpretation and enforcement. This section contains a unique contribution of the report—the summaries of a questionnaire which had been addressed to judges of the Federal courts concerning their attitudes, interpretations, and administration of antitrust laws.

The portion of the report dealing with the concurrent responsibility of the F. T. C. and Department of Justice for many antitrust

sections and laws argues that overlapping jurisdiction has prevented a unified plan and over-all program for effectively combating monopoly practices and restraints. The dual enforcement arrangement is accompanied by different powers, tools, functions, and remedies for each division. (For example, the F. T. C. is limited to the issuance of cease and desist orders and the Department of Justice invokes the broad powers of the equity courts, whereas the F. T. C. has extensive investigatory powers and the Department of Justice depends upon voluntary disclosures in civil proceedings.) The competition between the two agencies has meant that the consequence of an antitrust action depends upon the agency which initially institutes proceedings or ultimately makes the decision.

The views of individual economists and attorneys are summarized regarding mergers and distribution practices. The opinions, generalizations, and conclusions, for this study, are unaccompanied by quantitative support, statistics, documentary evidence, economic analysis, or qualifications. Such a procedure pays too much attention to individual expressions and too little attention to the fact the specialists often become general experts; i.e., many ideas advanced by economists are essentially legal, and the converse. Notwithstanding, virtually all the commentators appear to have accepted the basic premise and philosophy that the economy operates best under a system of free competition and enterprise, so that the underlying principle of the antitrust laws to maintain economic competition is unchallenged.

More dispersed economic and legal views are recorded on the conflict between price fixing and antitrust laws. The uncertainty amongst economists regarding monopoly and oligopoly is recognized in the limited predictive value of economic analysis in oligopolistic markets. The author states that the government believes (as economists do) that price rigidities in oligopolistic cases, in themselves, are not determinative of either effective or ineffective competition.

The over-all significance of the work is difficult to assess because its faults are subtle ones. These failings are not meant as objective criticisms but rather as subjective impressions and preferences.

There is remarkably little that is new in the book, since most of its ideas and opinions adhere closely to those of the past. In this sense, therefore, the report reflects the current confusion in the field. In addition, there is a substantial lack of attention to crucial factors, as the wide divergence in evaluations regarding the problems and

solutions, and no real discussion of whether the issues deserve legal or economic emphasis. The author's choices, when made, are usually based upon procedural and legal grounds (cf., author's recommendations). Finally, the issue is not faced that the antitrust laws may merely reconstitute rather than resolve monopoly problems, since the existence or non-existence of undesirable competitive practices, as oligopolistic price agreements, prove something or nothing, respectively.

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Trust and Antitrust in Norway and Denmark.

The average American tends to look upon Scandinavia as a unit, rather than as a family name of three or four different nations. Considering the modest size and relative homogeneity of culture and outlook of these countries this is understandable. In the field of law, particularly, there are many Interscandinavian parallels—frequently the result of deliberate cooperative effort (the laws of contract and sales are notable examples). As the varying approaches of the Anglo-Saxon countries indicate, however, vast differences in public policy on restrictive business practices may emerge in spite of a common heritage in general jurisprudence.

Great dissimilarities also exist among the Scandinavian countries in this area. The Swedish legislation, while generally not reminiscent of American policies, is unique among the Northern countries in being based on a presumption in favor of competition in business. Swedish law also operates in an economy which is more like that of this country in spirit and outlook than that of most other European nations, probably including even Ludwig Erhard's Germany. As shown by Steen Richter, Executive Secretary of the Danish Monopolies Supervision Agency in his *Monopolloven med kommentarer* (The Monopoly Law of 1955 with Commentaries), Danish philosophy on restraint of trade is somewhat more ambivalent. The Norwegian legislation, as surveyed by Professor Torstein Eckhoff and Mr. Oyjstein Gjelsvik in *Prisloven av 26 juni 1953 med kommentarer* (The Law on Control and Regulation of Prices, Profits and Competitive Conditions of 1953 with Commentaries), stands out as an instance of highly "pragmatic" rather than "doctrinaire" legislation, with a certain overall bias in favor of the regulation of competition

rather than its enforcement. In this respect it has much in common with corresponding enactments in the Netherlands and Belgium, as indeed the economy of Norway tends to be of the close-knit variety encountered in the Low Countries.

While the legislation currently in force in Scandinavia is of recent date, the nations of that region are no novices in the field. The Norwegian experience dates back further than that of any other European country, in that the emergency law on price control enacted in that nation during World War I included special provisions on the regulation of competitive conditions and single-firm monopolies. In 1926 these provisions were replaced by a law on "The Control of Practices in Restraint of Competition, and of Unreasonable Prices." This act proceeded along three lines. First, it sought to make restrictions on competition matters of public record by making compulsory the *registration* of collective arrangements in restraint of trade, and of single-firm monopolies, with a "trust control board." Second, the board under certain conditions—and notably in cases where competition did not seem to be of the workable variety—was granted the power to *regulate prices*. (This power was used with relative moderation.) Third, the board was given broad powers to deal with certain *practices* in restraint of trade or in promotion of monopoly, especially with regard to boycotts, refusal to sell, and other forms of exclusionary behavior.

The Norwegian legislation of 1953 in many respects represents a continuation of the old. In particular, it builds upon and re-enforces the great body of precedents concerning exclusive practices which has accumulated under the 1926 and later enactments. It incorporates the registration feature. Proceedings against "unreasonable" prices are made a main duty of the administrative enforcement agency, assisted by local price offices in every community. The use of "unnecessary" middlemen in trade is prohibited.

The Government and the enforcement agency are given wide powers to approve, regulate and eliminate particular provisions in restrictive arrangements; the Government may also dissolve cartels when and if it finds this appropriate. Appeals may be taken freely from one level to the next in the administrative hierarchy, but the courts can be called upon only under certain conditions.

The Danish legislation of 1955 has several parallels with the Norwegian. It is the outgrowth of tradition in placing primary emphasis

on registration and publicity as deterrents of undue restraints on competition. It is skeptical of exclusive arrangements. Like the Norwegian law, the Danish statute exempts labor organizations and practices from its operation. But there are also important distinctions. The regulation of prices under the new Danish law is exceptional rather than commonplace, and the enforcement of the law is more bent towards the elimination of unreasonable restraints of trade than towards their modification by administrative order. Resale price maintenance is generally prohibited—exceptions to this rule may be granted only under special circumstances. Danish enforcement agencies enjoy much less discretionary power than their Norwegian counterparts, and almost without exception appeals may be taken from their decisions to the regular Danish Courts of Appeals.

It is to be regretted that as yet no authoritative survey of the Danish and Norwegian antitrust legislation exists in the English language. In the meanwhile, it is a pleasure to report that to a reader of their native languages, the two volumes inspiring this article evince scholarship and thoroughness.

Steen Richter, *Monopolloven med kommentarer.* Gads Publishing Company, Copenhagen, 1955.

Torstein Eckhoff and Oystein Gjelsvik, *Prisloven av 26 juni 1953 med kommentarer,* Johan Grundt Tanum Publishing Company, Oslow, 1955.

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Notes

EARL W. KINTNER SWORN IN AS FTC COMMISSIONER

Earl W. Kintner of Indiana, General Counsel of the Federal Trade Commission, was sworn in June 9, 1958 as a member of the Federal Trade Commission.

The oath was administered by Honorable Tom C. Clark, Associate Justice of the U. S. Supreme Court, a past president of the Federal Bar Association, of which Mr. Kintner is serving his second term as president.

Acting Chairman Robert T. Secrest presided at the ceremony held in Room 532 at the FTC building at 11 a.m. Other members

of the Commission are Sigurd Anderson of South Dakota and Edward T. Tait of Pennsylvania, Republicans, and William C. Kern of Indiana, a Democrat. Mr. Secrest of Ohio is a Democrat.

Mr. Kintner, the third Republican, fills a vacancy created by the recent retirement of Chairman John W. Gwynne of Iowa, whose term on the Commission expires in September, 1960. Mr. Kintner was nominated to the position by President Eisenhower on May 7th and unanimously confirmed by the Senate June 4th.

Mr. Kintner has served as General Counsel of the Commission since July, 1953. He became a trial attorney at the Commission in 1948, and in 1951 was promoted to legal adviser. He planned, edited and largely wrote a definitive staff manual for FTC attorneys, covering all areas of the Commission's legal work. For this work he received a Distinguished Service award from the Commission in 1953.

As a trial attorney, Mr. Kintner participated in the trial of industry-wide antimonopoly cases. In 1953-1954 he was a delegate to the President's Conference on Administrative Procedure and was Chairman of the Conference Committee on Hearing Officers, which made the first official comprehensive study of that area of administrative law.

During his services as General Counsel, Mr. Kintner has been the Commission's chief legal officer and adviser and has argued and won several important decisions for the Commission in the U. S. Supreme Court and in the U. S. Courts of Appeals.

Mr. Kintner was born at Corydon, Indiana, on November 6, 1912 and grew up on a farm in Gibson County, Indiana. He supported himself from the age of eight, successively doing farm, restaurant, and newspaper work. He attended public schools at Princeton, Indiana, and was graduated from DePauw University, Greencastle, Indiana, with an A.B. degree in 1936. In 1938 he was graduated from Indiana University School of Law, Bloomington, Indiana, with a J.D. degree, being one of the winners of the school's first moot court competition and later judge of moot court on a special law school scholarship.

During his last year in law school, Mr. Kintner was an unsuccessful Republican candidate for Prosecuting Attorney of the 66th Indiana Judicial Circuit. He engaged in the general practice of law at Princeton, Indiana, from 1938 until he entered military service in 1944. From 1939-1942 he served as City Attorney at Princeton,

Indiana. He was elected Prosecuting Attorney of the 66th Indiana Judicial Circuit in 1942. Reelected to the same post in 1944 and 1946 without returning to campaign, he resigned in each instance due to being in military service.

FTC Chairman Earl W. Kintner Issues Policy Statement

Earl W. Kintner of Indiana, who was sworn in on June 9th as a member of the Federal Trade Commission and who was designated Chairman of the Commission on June 11th by President Eisenhower, formally assumed the Chairmanship on Friday, June 12th.

Acting Chairman Robert T. Secrest turned over the reins to Mr. Kintner at a special meeting of the Commission on that date. Commissioner Secrest has served as Acting Chairman since the retirement on June 1st of former Chairman John W. Gwynne.

After taking office, Mr. Kintner made the following statement:

> "I wish to express to the President my deep appreciation for this high honor and the privilege of further serving the Government. Also, I extend my grateful thanks to all those within and without the Federal Trade Commission who have helped make possible this opportunity for service.
>
> "My philosophy toward antitrust and trade regulation can be briefly stated. I believe in vigorous enforcement of the laws, coupled with a maximum effort to encourage voluntary adherence to the laws by the business community. I believe that the Commission in all its actions should accord to those it regulates a maximum of fairness and due process."

Proposed Congressional Legislation Relating to Trade Regulation, 1st Session, 86th Congress*

Sherman Act

Re: Protection of commerce from unreasonable restraints by labor unions[1]	Hoffman	HR-7331

* For a list of bills introduced earlier in this Session, see IV Antitrust Bulletin 154 and 331 (1959).

[1] House Judiciary Committee.

Re: Territorial Security for automobile dealers[2]	Langer	S-997
	Schoeppel	S-2042
	Hruska	S-2047
	Monroney	S-2151

Other Acts

Internal Revenue Code— (Nonrecognition of gain on distribution of stock per antitrust decree)[3]	Simpson (Pa.)	HR-7361
	Simpson (Pa.)	HR-8126
	McDowell	HR-8231
NLRB— (To prohibit contracts, combinations or conspiracies which if entered into by other than labor organizations would violate antitrust laws)	Hoffman (Mich.)	HR-7332[4]

Miscellaneous

Unfair Commercial Activities Act[5]	Lindsay	HR-7833
Prohibition of concerted activities by unions which interfere with free production of goods for commerce[6]	Broyhill	HR-7916
	Hoffman (Mich.)	HR-7918
	Alger	HR-8003
	Hiestand	HR-8008

2 Senate Interstate & Foreign Commerce Committee.

3 House Ways and Means Committee. HR-8126 amends HR-7361 to incorporate Dept. of Justice and Treasury recommendations developed during Senate Finance Committee's hearings on Senator Freer's S-200. The latter bill was also amended.

4 House Education and Labor Committee.

5 House Interstate & Foreign Commerce Committee.

6 House Education & Labor Committee.

Legislative Comments

A. *Laws Enacted*

On July 23rd, 1959, the President signed Senator Sparkman's S-726 into law. It provides for more expeditious enforcement of cease and desist orders issued pursuant to Section 11 of the Clayton Act. The bill was passed by the Senate on March 18th and, with amendment, by the House on July 6th. The Senate accepted the amendments on July 8th and sent the bill to the White House. Typographical errors were subsequently discovered and the Senate was forced to resort to the unusual procedure of requesting the President to return the bill for correction. Both houses agreed to the amendments and the bill was formally passed by Congress on July 13th.

B. *Other Action*

1. Senate

The Antitrust Civil Process Act (S-716) was approved, with amendments, by the Senate Judiciary Committee on June 29th. Part II of the Senate Report No. 451 records the minority's views on this bill. As amended, the bill would authorize disclosure of documents procured pursuant to this law to the Judiciary Committee of both houses.

On June 22nd and 23rd, the Special Subcommittee on Automobile Marketing Practices of the Senate Interstate and Foreign Commerce Committee held hearings on the so-called territorial security bills—S-997, S-2042, S-2047 and S-2151. Commissioner Kintner voiced the FTC's opposition to these bills but the Department of Commerce expressed approval of Senator Langer's S-997.

Hearings were held on June 15-16 and July 10th by a subcommittee of the Senate Interstate and Foreign Commerce Committee on a national fair trade bill but no action has yet been reported.

On July 15th, the antitrust subcommittee of the Senate Judiciary Committee rejected a motion to table S-838 and S-839 (proscribing automobile manufacturers' financing and insuring activities) thus maintaining their status quo before this body.

On July 22nd, the subcommittee of the Senate Interstate and Foreign Commerce Committee studying fair trade legislation voted

to take no further action on the pending bills for the balance of the year.

The antitrust subcommittee of the Senate Judiciary Committee held hearings on July 28th on two of the professional sports bills, viz., S-616 (unqualified exemption) and S-886 (limited exemption).

While a motion was adopted by the Senate Judiciary Committee on July 20th to make S-442 (pre-merger notification) the first order of business at its July 27th meeting, a dispute over the pending civil rights bill resulted in this action being rescinded.

2. House

During the hearings conducted on June 25th and 26th by the House Judiciary's antitrust subcommittee, Messrs. Bicks and Kintner expressed the opposition of their respective agencies to the pending mandatory functional discount legislation (HR-848, 927, 2788, 2868 and 4530).

Hearings were conducted by the House Ways and Means Committee on July 20-21 on bills relating to the taxation of stock distributed as a result of a divestiture decree. As a result of the objections voiced by the Treasury and Justice Departments during the Senate Finance Committee's hearings on Senator Freer's S-200 on May 26th and 27th, Representative Simpson substituted HR-8126 in lieu of his HR-7361 and Senator Freer amended his companion bill to conform to these suggestions. Both Departments indicated that they would support the bills if amendments were made to meet some of the problems they foresaw.

On July 21-22, a subcommittee of the House Interstate and Foreign Commerce Committee conducted hearings on Representative Bentley's HR-2729 (dual distribution) as a follow-up to fair trade hearings held in March. At that time, the Department of Justice and the Federal Trade Commission expressed their opposition to this bill. Mr. Kintner reiterated the opposition expressed by his predecessor.

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